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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION

HOWARD *v.* ODHAMS PRESS, LIMITED.

SAME *v.* SAME.

[1935. H. 1043.]

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Feb. 15, 16, 17;
March 22.

Contract—Public policy—Agreement not to disclose statement by party regarding offences committed or intended by him and others against third parties—Validity—Breach of contract—Disclosure of statement—Expulsion of party making statement from trade union—Cause of expulsion, whether party's own misconduct or disclosure of statement—Damages, whether nominal or substantial.

The plaintiff was a workman in the printing trade, and until he lost his membership as hereinafter stated he was a member of the trade union of that trade. The defendants were the printers and publishers of a newspaper in which for several years they had organized weekly crossword competitions for large money prizes.

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The plaintiff had for several years been employed by the defendants as a sorter in their competition department, and thereafter in a similar capacity on another newspaper, but subsequently he was unemployed. The defendants, suspecting that systematic fraudulent cheating was going on among their sorters, made inquiries and got into touch with the plaintiff. In the result the plaintiff, on the faith of a verbal promise of secrecy by the defendants' representative, signed and left with the latter a typed document containing statements made by him to the effect that he had taken part in a fraud against the other newspaper on which he had been employed ; that two further frauds in which he was to share had been proposed but not yet committed ; that the method of the frauds was as therein particularly described ; that there were groups of persons in the defendants' competition department staff working the swindle regularly every week, and that certain named persons were suspected by the plaintiff to belong to these groups ; and that the plaintiff was making the statement on the definite understanding that it was not to be used against him or divulged to any third party. Subsequently the defendants, being dissatisfied with the conduct of the plaintiff, handed a copy of the said document to the plaintiff's union. The plaintiff was thereupon expelled from the union and had since failed to obtain work in his trade and lost unemployment pay and other benefits from membership of the union. In these circumstances the plaintiff, asserting a valid contract between himself and the defendants under which he had given to the defendants the information contained in the above mentioned document in consideration of a promise of secrecy on their part, brought an action against the defendants alleging that they had committed a breach of that contract by disclosing the document to the plaintiff's union and claiming as damages the loss sustained by him in consequence of his expulsion from the union :—

Held, by the Court of Appeal (reversing on this point the judgment of Porter J. at the trial of the action), that the contract sued upon was invalid as being against public policy, inasmuch as it purported to prevent the defendants from giving information to third parties which might assist them to secure the conviction of persons who had defrauded them in the past or to prevent the commission of frauds against them in the future.

Weld-Blundell v. *Stephens* [1919] 1 K. B. 520, 528, 533, 539, affirmed [1920] A. C. 956, observations considered.

Held, further (affirming on this point the judgment of Porter J.), on the assumption that the contract sued upon was valid, that the damage to the plaintiff consequent upon his expulsion from the trade union was not caused by the defendants' breach of that contract by disclosing the plaintiff's statement to the union, but by his own wrongful conduct, and, no other substantial damage being claimed, that the plaintiff could only recover nominal damages from the defendants for that breach of contract.

Neville v. *London " Express " Newspaper, Ld.* [1919] A. C. 368 ; and *Weld-Blundell* v. *Stephens* [1920] A. C. 956, followed.

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APPEAL and CROSS-APPEAL from a judgment of Porter J. in an action tried by him without a jury.

John Howard, the plaintiff, was a workman in the printing trade, and, until he lost his membership as hereinafter stated, he was a member of the National Union of Printing, Bookbinding, and Paper Workers, a trade union, membership of which was incumbent upon any worker in a trade included in the union who desired employment, and was equivalent to a testimonial for honesty and respectability. Odhams Press, Ld., the defendants, were the printers of two newspapers called The People and the Daily Herald, and the publishers of the former of these newspapers. The defendants had for several years organized crossword competitions in these newspapers in which large prizes were awarded to competitors who sent in correct solutions. The plaintiff had been employed by the defendants as a sorter in their competition department from 1928 down to the spring of 1932; in the autumn of 1933, he was employed by another newspaper, the Daily Express; and thereafter he was unemployed. Meanwhile the defendants had reason to suspect that prizes in their crossword competitions were being won unfairly, but it was not known by whom or how the frauds were effected, and the defendants were anxious to ascertain the method adopted by the fraudulent winners and to break up the gang engaged in the swindle. About the end of 1933 or beginning of 1934 they received an anonymous letter referring to the frauds and mentioning the plaintiff and others in connection therewith, and they thereupon employed a Mr. Bunn, an ex-police officer, to make investigations. Just before the receipt of that letter one of the defendants' competitions had apparently been won by a Mrs. Watson. She was suspected, and the cheque which had been sent to her was stopped. Though asked to visit the defendants and establish her claim she failed to do so. On February 20, 1934, Bunn interviewed the plaintiff, who made a statement to him.

On February 26, 1934, a meeting took place at the Waldorf Hotel, London, at which there were present the plaintiff, the plaintiff's wife, Mr. Bunn, and a Mr. Cook, the manager of the defendants' competition department. The plaintiff then made a further oral statement. Mr. Cook thereupon dictated the substance of that statement, which was taken down in shorthand and typed. On being asked if he had any objection to signing the typed statement the plaintiff said that he had not, but that it would be a serious matter for him if it got to the knowledge of his union. He stipulated, therefore, that if he made and signed a statement it should contain a promise by the defendants that it should not be divulged to any third party. Mr. Cook, on behalf of the defendants, agreed, and the typed statement with additional paragraphs as to secrecy was thereupon signed by the plaintiff and his wife, and witnessed by Bunn.

That statement contained the following information: that a fraud of which particulars were given had been worked by one Wood in conjunction with the plaintiff in the case of the Daily Express competition, out of the proceeds of which the plaintiff had received 400*l.*; that in respect of the Daily Herald and People competitions two further frauds in which the plaintiff was to share had been proposed, but so far as the plaintiff was concerned had not as yet been committed; that the method by which frauds of this description were perpetrated was that of which detailed particulars were given in the statement; and that there were at least three "schools" in the Daily Herald and People competition department staffs working the swindle regularly every week, the names of certain persons suspected by the plaintiff to belong to these schools, and also members of the same trade union, being given. The two concluding paragraphs of the statement were as follows: "I am making this statement on the definite under-"standing that it is not to be used in any way against me and "that it will not be divulged to a third party by any one present "at the taking of my statement. I agree that should, as a "result of this information, it be possible for any steps to be "taken to clear up this competition swindle, I am prepared, "should I be asked, to consider allowing this statement to be "used—on one condition—that the reference with regard to "the Daily Express is not to be communicated to them nor "used against me or my wife in any way."

At the interview at which this statement was made the plaintiff, besides giving the information contained in the statement, promised to assist the defendants in investigating past swindles including the Watson case, and in putting an end to them. On February 28, 1934, a further interview took place between the same parties at which the plaintiff renewed his promise of assistance. At both these interviews the defendants promised, in return for the plaintiff's services, to assist him and his wife with money, and they did in fact pay him sums of 1*l*. and 5*l*. The defendants themselves were anxious that the fraudulent practices in the competitions should not be known to the public, and this had been impressed upon the plaintiff by Mr. Cook.

Finding that he was getting from the defendants neither the money he expected nor any other reward such as employment, the plaintiff wrote to the managing director of the defendants a letter dated April 6, 1934, threatening that if assistance was not given to him he would make the whole matter public.

On April 9, 1934, the defendants, having come to the conclusion that the plaintiff was not performing his part of the contract and that they were therefore free from their obligation of secrecy, without any communication with the plaintiff, handed the plaintiff's signed statement to the secretary of his trade union.

As a consequence of the disclosure the plaintiff and other members were summoned before the branch committee of the trade union, which on April 12 and 13, 1934, heard them and deliberated upon their cases, and on the latter date determined to exclude the plaintiff and most of the other accused men from the union. This they apparently purported to do under the Rules of the union: which provided (inter alia): "Rule 24. Mis-"conduct of Members . . . . (2.) Any member shall be liable to "exclusion from the union and shall forfeit all money paid "thereto . . . . (*f*) if, having knowingly acted to the detriment "of the interests of the union." (1) By letter dated April 18,

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(1) Some other rules of the union are mentioned below in the judgments.

1934, the branch committee sent to the plaintiff notice of his exclusion. The plaintiff gave notice of appeal from the decision of the branch committee to the union, but did not proceed with the appeal.

Ever since his exclusion from the union the plaintiff had been unemployed.

On March 28, 1935, the plaintiff brought the present action against the defendants claiming damages for breach of contract. In his statement of claim the plaintiff alleged in substance, inter alia: (para. 6) that Mr. Cook on behalf of the defendants had orally promised and undertaken that in consideration of the plaintiff giving any information which he possessed in connection with the said frauds any statement made by him in connection therewith would be kept secret and would at no time be used to the detriment of the plaintiff; (para. 7) that accordingly the plaintiff had made the statement the substance of which had been typed and signed by him; (para. 9) that in breach of the said promise and undertaking Mr. Cook, on behalf of the defendants, had communicated that statement to the plaintiff's union; (para. 10) that by reason of that communication the plaintiff had been expelled from that union; (para. 11) that by reason of the premises the plaintiff had lost unemployment pay at the rate of 10*s.* a week from the union and other benefits, and was unable to obtain employment as a sorter in newspaper competitions or in any other capacity; and that the plaintiff claimed for loss of unemployment pay for fifty weeks 25*l.*, and for loss of other benefits from the union and inability to find employment further damages.

The defendants stated in their defence, inter alia: (para. 7) that they denied that they had made the alleged or any contract with the plaintiff, or that the parties had intended to make any contract enforceable in law; (para. 8) that if any contract had been made between the plaintiff and the defendants it had been a term and condition thereof that the plaintiff should give to the defendants the whole of the information which he possessed and should assist the defendants to the best of his ability in ascertaining the whole of the facts in connection with the said frauds and in preventing any repetition thereof; and

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that in breach of that condition and in repudiation of the contract the plaintiff had not performed the undertakings so given by him, by reason whereof the defendants had been discharged from any liability to the plaintiff under the contract; (para. 9) that further or in the alternative, if the defendants had purported to make any contract with the plaintiff as alleged the said alleged contract had been contrary to public policy and void for that reason and for uncertainty and was unenforceable; (para. 10) that the defendants admitted that they had communicated to the plaintiff's said union the facts contained in the said statement of the plaintiff; and (para. 11) that if the plaintiff had been expelled from the union and had lost unemployment pay, the cause of that expulsion and loss had been the criminal conduct of the plaintiff.

On March 16, 23, 30, 31, and April 22, 1936, the action was tried by Porter J., evidence being given and arguments advanced on both sides.

On April 22, 1936, Porter J. gave judgment. In the course of it he stated the admitted facts substantially as above set out. He further found on the evidence before him that the defendants never made any promise to pay to the plaintiff any definite sum or to find him employment, though the plaintiff was left with the impression that some provision might be made for him; that the promise of further information and assistance given by the plaintiff was an independent promise given in return for promised reward, and was neither an express nor implied term of the promise of secrecy on the defendants' part; that the defendants both knew themselves and were expressly told of the necessity of secrecy, and that if the facts reached the trade union it would be disastrous to the plaintiff, and on the other hand it was desirable for the defendants that the fraudulent practices in the competitions should not be known to the public; that it was not proved that the plaintiff had any such knowledge of the Watson fraud as the defendants supposed, or that he failed to give such assistance as he could, and that it was doubtful whether he had much information to give; and that he used his supposed ability to help in order to extract as much money as he could from the defendants. His Lordship then dealt with the questions

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of law. The typed statement had been treated as a contractual obligation, and the questions argued before him had been (1.) was that agreement contrary to public policy, and (2.), if not, was the damage ensuing to the plaintiff caused by the publication of the statement or by his own wrongful act, and therefore irrecoverable. As to the first of these questions, if all that the defendants' promise in the agreement meant was that information as to the plaintiff's wrongdoing would not be furnished in the first instance by the defendants to the trade union or even to the police, his Lordship saw little harm in the promise; but if it meant that the defendants would refuse to disclose the information which they had received even if served with a subpœna, he should hold the bargain invalid. Did it mean that the defendants, if summoned to give evidence, must run away, or merely that the information which they had received was not to be used by them in the first instance? His Lordship thought that it bore the second meaning and not the first. The defendants must not take the initiative in divulging the information and they must not use it against the plaintiff in any way, but there was nothing to prevent them giving evidence of it in a Court of law if summoned to do so. This view was not inconsistent with the view of the Lords Justices in *Weld-Blundell* v. *Stephens* (1), which was approved by the House of Lords in that case. (1) The contract was not therefore void as against public policy. That determination, however, left open the second of the questions mentioned, which had been much canvassed in the case just cited, both in the Court of Appeal and the House of Lords—namely, whether the damage which followed the defendants' disclosure of the document was caused by the disclosure or must be regarded as the result of the plaintiff's own wrongdoing. Having regard to that and the other relevant cases his Lordship concluded that the plaintiff did not lose his trade union ticket because the defendants had disclosed his fraud but because he had been dishonest. The defendants' breach of the contract therefore entitled the plaintiff to nominal damages only and he would be awarded 40*s.*; but in case it should be held on appeal that the

(1) [1919] 1 K. B. 520; [1920] A. C. 956.

plaintiff was entitled to substantial damages, his Lordship assessed these at 400*l*.

The plaintiff gave notice of appeal dated May 29, 1936, for an order that the judgment of Porter J. that the plaintiff should recover 40*s*. only might be set aside and that judgment might be entered for the plaintiff for 400*l*., or in the alternative that a new trial might be had between the parties.

The defendants gave notice of cross-appeal dated June 26, 1936, that they intended upon the hearing of the plaintiff's appeal to contend that the said judgment should be varied, or rescinded, and that instead thereof judgment should be entered for the defendants.

Richard O'Sullivan K.C. and *B. M. Cloutman* for the plaintiff. The learned judge was wrong in awarding the plaintiff only nominal damages instead of substantial damages, which the judge assessed at 400*l*., for the defendants' breach of the contract between the plaintiff and themselves. The plaintiff, having made an oral statement in which he confessed to irregularities amounting to a misdemeanour while he was employed as a sorter of the Daily Express newspaper and gave information as to similar irregularities in the sorting staff of two of the defendants' newspapers, agreed to sign a typed copy or statement on the faith of a promise by Mr. Cook, the defendants' manager, that the statement should not be communicated to any third party, and the typed and signed copy contained a clause to the effect that it was made on the definite understanding that it would not be divulged to a third party. A contract was thus entered into by which the plaintiff gave to the defendants certain information in consideration of a promise of secrecy on their part. Eventually Mr. Cook sent the statement which the plaintiff had signed to the trade union to which the plaintiff belonged, the National Union of Printing, Bookbinding and Paper Workers. He knew that as a result of his action disciplinary measures would be taken by the trade union against the plaintiff, and he intended that these measures should be taken. The plaintiff was summoned before the trade union with reference to the statements he had made against other members thereof. The matter was dealt with by the local branch and not by the general council of the trade union. The plaintiff was expelled from the trade union in consequence of the irregularities which he had committed while employed by the Daily Express newspaper. The expulsion took place under rule 24, sub-rule 2, of the Rules of the trade union. As a result of the expulsion the plaintiff has been unable to find employment in his trade and has lost unemployment pay, and has thus sustained very substantial damage. There was a contract between the plaintiff and the defendants which, it is submitted, was not invalid either as being against public policy or on any other ground; by that contract the defendants were bound not to divulge the information which was given to them by the plaintiff; the defendants committed a breach of that contract by disclosing that information to the trade union; and in consequence of that breach the plaintiff has lost his membership of the trade union and has suffered damage. In these circumstances the plaintiff is entitled to recover substantial damages from the defendants. The plaintiff's right to damages is rendered stronger by the fact that the plaintiff's expulsion from the union was due mainly to the disclosure by the defendants of the plaintiff's misdemeanour when in the employment of the Daily Express, which it was not necessary that the defendants should have known about, and which they had no duty to disclose to anybody. That right is further strengthened by reason of the fact that the defendants disclosed the plaintiff's statement to the trade union with the deliberate intention that the trade union should take disciplinary measures against the plaintiff and expel him from the union.

[SLESSER L.J. According to the Rules the penal powers of the branch are limited to imposing a fine of 5*l*. and do not extend to expelling a member, and it may therefore be that the expulsion of the plaintiff was a nullity.]

If it was the practice of the trade union to have matters relating to expulsion decided by the branches, whose decisions were subsequently submitted to and sanctioned by the executive council of the union, then a decision of the branch expelling a member so sanctioned would comply with the Rules. Whether or not it was within the power of the branch to expel the plaintiff it was the intention of the defendants that it should do so, and the defendants are therefore responsible for the expulsion. The defendants broke the contract knowing that the breach would probably involve the plaintiff's expulsion from the trade union and intending that it should be followed by that consequence, and, therefore, according to the rule in *Hadley* v. *Baxendale* (1), they are liable to the plaintiff for the damage which naturally arose from the breach. The rule that an agreement to indemnify a party against the legal consequences of his wrongdoing is invalid in law is confined to cases where the wrong is a tort or a crime and does not apply where it is a breach of contract: see *Hammond & Co.* v. *Bussey* (2) and *Agius* v. *Great Western Colliery Co.* (3) Here, even if the plaintiff had been guilty of dishonesty it would not have been known but for the defendants' breach of contract. There is no necessary connection between the plaintiff's dishonesty amounting to a misdemeanour and his losing his membership of the union. In *Weld-Blundell* v. *Stephens* (4) it was held by all the members of the Court of Appeal that there was a duty on the defendant to keep secret a certain letter. It was also held by two members of the Court that the plaintiff could recover only nominal damages for the defendant's breach of duty, any further damages being in the nature of an indemnity against the consequences of his own wilful wrong. In the House of Lords (5) it was held by a majority of three against two that there had been a novus actus interveniens and that the plaintiff's liability for damages in the libel actions which had been brought against him in respect of the letter did not arise from the defendant's breach of duty, and that the defendant was liable for nominal damages only. That decision was followed by Luxmoore J. in *Bradstreets British, Ld.* v. *Harold Mitchell and Carapanayoti & Co.* (6) These cases only show that a man cannot recover damages for his own tort or crime.

(1) (1854) 9 Ex. 341, 354.
(2) (1887) 20 Q. B. D. 79.
(3) [1899] 1 Q. B. 413.
(4) [1919] 1 K. B. 520.
(5) [1920] A. C. 956.
(6) [1933] Ch. 190.

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[SLESSER L.J. The contract between a trade union and one of its members depends on the Rules of the union. If a member of this union has committed an act which comes within rule 24, sub-rule 2 (*f*), then the damage he suffers is the result of his own act and not of any disclosure by a third party.]

A trade union is not part of the legal machinery of this country, and it does not administer the law of England. A charge against a fellow-member of a trade union does not imply that he has committed a wrong according to the law of England. If a man intends the consequences which follow from his act, then no question of remoteness of damage arises: *Quinn* v. *Leathem*. (1) Here, the decision of the trade union to expel the plaintiff was not the necessary and direct consequence of the plaintiff's act of wrongdoing, because a Court of law might not have come to the same conclusion as the trade union. If it follows from Cook's disclosure in breach of his contract that a charge was brought against the plaintiff which did not amount to a crime and the plaintiff was expelled in consequence thereof, the plaintiff has a right of action against the defendants, and it is immaterial that another charge might have been made against him which would amount to a crime. In *Shackell* v. *Rosier* (2) it was held that a promise by the defendant to indemnify the plaintiff against the costs of an action for libel published at the defendant's request was void, Tindal C.J. observing (3) "a promise to indemnify a man "against all the consequences of an offence cannot be supported "on any principle of law." In *Burrows* v. *Rhodes* (4) it was held that where a person is induced by the fraudulent misrepresentation of another to do an act which in consequence of such misrepresentation he believes to be neither illegal nor immoral, but which is in fact a criminal offence, he has a right of action against the person so inducing him for damages sustained by him in consequence of his having done such act. In that case the distinction which is set up in the present case was adumbrated. Although damages for penal consequences cannot be recovered, yet damages for other consequences can

(1) [1901] A. C. 495, 537.
(2) (1836) 2 Bing. N. C. 634.
(3) (1836) 2 Bing. N. C. 646.
(4) [1899] 1 Q. B. 816.

be recovered. In *Cointat* v. *Myham & Son* (1) a plaintiff who had been convicted under s. 47 of the Public Health (London) Act, 1891, for having bad meat for sale was allowed to recover against his vendors as damages the fine and costs which he had suffered and also for loss of trade. The cases were discussed by Rowlatt J. in *R. E. Leslie, Ld.* v. *Reliable Advertising and Addressing Agency, Ld.* (2), where he held that moneylenders who had been convicted of sending circulars to minors without having reasonable ground for believing the addressees to be of full age could not claim to be indemnified by the firm who addressed and sent out the circulars on their behalf in respect of the fine and costs they had had to pay. Although on grounds of public policy, when a fine or costs are imposed upon a person as a punishment, the law says that that person shall not ease himself of that punishment by recovering the amounts paid from some other person, nevertheless any other damage due to a breach of contract is recoverable. It cannot be suggested that the loss by the plaintiff of his membership of the union and the consequences flowing therefrom arose solely from the acts of the plaintiff committed two years previously. There is no legal connection between the plaintiff's misdemeanour and the loss of his membership. The cases show that the principle that the plaintiff cannot recover damages only applies where the law has imposed the punishment.

[GREENE L.J. In *Neville* v. *London "Express" Newspaper, Ld.* (3), which was an action for damages for maintenance, Lord Finlay L.C. said (4): "The plaintiff, it is true, has had to repay "money which he had obtained by fraud and to pay costs in "respect of his having resisted payment. It cannot be regarded "as damage sufficient to maintain an action that the plaintiff has "had to discharge his legal obligations or that he has incurred "expenses in endeavouring to evade them."]

In this case the plaintiff committed a misdemeanour in 1932. He was liable to be prosecuted and punished for that misdemeanour, and if he were punished by payment of a fine and costs, he could not recover that fine and costs as damages under

(1) [1913] 2 K. B. 220.
(2) [1915] 1 K. B. 652.
(3) [1919] A. C. 368.
(4) Ibid. 380.

any contract. But the misdemeanour did not involve him in any consequences with the trade union, because the union does not administer the common law of England. The damage which the plaintiff suffered was, on the evidence, a direct consequence of the defendants' breach of contract in making the disclosure of the document. There was no interruption in the chain of consequences which followed from the disclosure. The trial judge was not bound by the authorities to award merely nominal damages instead of the 400*l.* at which he assessed the damage which the plaintiff had suffered.

Gilbert Beyfus K.C. and *Valentine Holmes* for the defendants. The appeal raises a question as to the amount of the damages recoverable for breach of a contract, but the cross-appeal raises a question as to the validity of that contract, and therefore it ought logically to be first disposed of, because if the contract is invalid the question of the amount of damages for breach of it cannot arise.

First, then, the defendants submit that the alleged contract under which the plaintiff gave to the defendants the information contained in the typed document as to the offences committed or contemplated by the plaintiff in consideration of a promise of secrecy by the defendants was void as being against public policy. The leading principle applicable to this case was thus stated by Lord Lyndhurst in *Egerton* v. *Brownlow* (*Earl*) (1): " Any contract or engagement having a tendency, however "slight, to affect the administration of justice, is illegal and "void." In *Lound* v. *Grimwade* (2), where part of the consideration for a bond was a promise that the obligor's name should not be mentioned in certain criminal proceedings, Stirling J. (2) quoted this statement of Lord Lyndhurst, and added that upon that principle it had been repeatedly held that agreements tending to affect the course of legal proceedings were illegal, even though those proceedings might not be strictly criminal in their nature. It cannot be disputed that a contract to prevent a prosecution for, or even to suppress knowledge of, a felony is void as being contrary to public policy. Thus, where a father undertook a liability to a

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(1) (1853) 4 H. L. C. 1, 163.

(2) (1888) 39 Ch. D. 605, 612.

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bank in order to save his son from a possible prosecution for forgery at the instance of the bank, the arrangement was held invalid as being both inequitable and against the public interest: *Williams* v. *Bayley.* (1) The authorities show that the same principle applies in the case of a misdemeanour. A contract for the compromise of any public offence, whether felony or misdemeanour, is apparently invalid, even though sanctioned by the judge at the trial: see *Keir* v. *Leeman.* (2) Where plaintiffs filed a bill for an injunction to restrain a former clerk from disclosing any of their dealings and transactions, and the defendant stated in answer that the plaintiffs had conducted their business in a fraudulent manner, and filed interrogatories for the examination of the plaintiffs as to these transactions, it was held that the plaintiffs must answer: *Gartside* v. *Outram.* (3) An agreement not to enforce a bond in consideration of the obligor not publishing the fact of the obligee's adultery with the obligor's wife was held to be no defence to an action on the bond: *Brown* v. *Brine.* (4) A contract for the compromise of an indictment for obstructing a public road, though made bona fide, is against public policy and illegal: *Windhill Local Board of Health* v. *Vint.* (5) The case of *Weld-Blundell* v. *Stephens* (6) is distinguishable from the present case, inasmuch as there the contract was to abstain from disclosing a civil wrong, whereas here it is to abstain from disclosing a crime; but in that case in the Court of Appeal both Warrington and Scrutton L.JJ. expressed the opinion that an agreement of the latter description would be invalid as against policy. A contract not to give evidence before a Court of law is bad as being against public interest: *Crampton* v. *Green.* (7)

[SLESSER L.J. referred to the notes to *Collins* v. *Blantern*, in Smith's L. C., 13th ed., p. 44, where the cases are collected.]

In the present case the contract by which the plaintiff, on his part, gave the information as to past crimes and intended future crimes in consideration of the defendants' promise of

(1) (1866) L. R. 1 H. L. 200.
(2) (1844) 6 Q. B. 308, 321; (1846) 9 Q. B. 371, 392.
(3) (1856) 26 L. J. (Ch.) 113.
(4) (1875) 1 Ex. D. 5.
(5) (1890) 45 Ch. D. 351.
(6) [1919] 1 Q. B. 520, 533, 539; [1920] A. C. 956.
(7) (1848) 10 L. T. (O. S.) 442.

secrecy is clearly against public policy and therefore void. It purports to bind the defendants to refuse to hand over the document containing the information even to the police though it might be of great assistance to them in bringing certain persons to justice. There is no evidence or argument to support the view of the learned judge that the promise of further information and assistance by the plaintiff and the promise of secrecy by the defendants are independent promises, and that the defendants' promise may be sued upon apart from the incriminating matter.

Secondly, if it be assumed that the contract was valid and that the defendants committed a breach of it in disclosing the plaintiff's statement to the trade union, the plaintiff can only recover nominal damages in respect of that breach. The plaintiff's expulsion from the union was due not to the defendants' breach of the contract but to the plaintiff's own misconduct. It appears from the plaintiff's statements in the typed document and in his statement of claim and from the evidence given at the trial that the plaintiff had committed the crimes of obtaining money by fraud and of attempting to do so, and by the Rules of the trade union loss of membership is the penalty appropriate to such conduct by a member. The damage suffered by the plaintiff by reason of his expulsion from the union must therefore be attributed to his own wrongful acts and not to the defendants' breach of contract. The plaintiff's own misconduct was the causa causans of that damage: the defendants' breach of contract was only the causa sine qua non. That view is in accordance with the opinions of the majority of the House of Lords in the case of *Weld-Blundell* v. *Stephens* (1), which, so far as this point is concerned, was very similar to this case. In that case it was held that the plaintiff could not recover from the defendant the damages which he claimed because the decision of the Court of law which imposed these damages was a novus actus interveniens between the defendant's breach of duty and the damages; and, similarly, here the defendants are not liable for the damage claimed by the plaintiff because the decision of the

(1) [1920] A. C. 956.

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trade union which inflicted that damage was a novus actus interveniens between the defendants' breach of contract and the damage. The defendants' cross-appeal should be allowed, and judgment entered for them.

Cloutman in reply:

First, the contract between the parties was not void as against public policy. The document containing the contract would be inadmissible as evidence at any criminal trial, having been obtained by an inducement, namely, a promise of money, and by persons in authority, namely the defendants, who were in a position to prosecute the plaintiff. The contract, therefore, in providing that its contents should not be disclosed, cannot be against public policy, for it is only prohibiting what the law itself would not allow to be done. A contract which may tend to prevent legal proceedings from being taken is not against public policy unless it amounts to either a contract to compound a criminal offence, a contract not to institute proceedings for such an offence, or a contract to stifle a prosecution once launched for such an offence. This contract does not come under any of these heads. On its true construction it only means that the defendants will not voluntarily divulge the plaintiff's statements to third parties, but not that they will refuse to disclose these statements to a prosecutor. A person having knowledge of an act of treason or felony and neglecting to reveal it is no doubt guilty of the technical offence of misprision of treason or felony. But the plaintiff's misdeed was neither treason nor felony but only misdemeanour, and there is no such offence as misprision of misdemeanour. To hold that the defendants were guilty of an offence in not disclosing the plaintiff's misdemeanour would be to introduce a new offence unknown to the law. Even for misprision of treason or felony there has been no prosecution for many years, and these offences may be regarded as having fallen into desuetude. Proceedings in respect of these offences would not now be regarded with favour by any Court.

[SLESSER L.J. It is an offence to abstain from giving aid to a constable in the exercise of his duty: *Reg.* v. *Sherlock.* (1)]

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(1) (1866) L. R. 1 C. C. R. 20.

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The cases cited on behalf of the defendants are clearly distinguishable from the present case. *Williams* v. *Bayley* (1); *Brown* v. *Brine* (2); and *Lound* v. *Grimwade* (3) were all cases of contracts for the compounding of offences; and *Keir* v. *Leeman* (4) and *Windhill Local Board of Health* v. *Vint* (5) were cases of contracts for stifling prosecutions.

Secondly, the damage done to the plaintiff by his expulsion from the union was caused by the disclosure by the defendants to the union of the plaintiff's statement. Unless the defendants had disclosed that statement the plaintiff would never have suffered the damage due to expulsion. That damage was so remote a consequence of the plaintiff's offence that that offence cannot be regarded as its cause.

The disciplinary action of the union in expelling the plaintiff was not a novus actus interveniens between the disclosure of the plaintiff's statement and the damage caused to the plaintiff. This case is distinguishable from *Weld-Blundell* v. *Stephens* (6), where the intermediate occurrence was the judgment of a Court of law. The plaintiff has a cause of action against the defendants for inducing the trade union to deprive the plaintiff of his membership of the union: *Quinn* v. *Leathem* (7) and *Bowen* v. *Hall.* (8)

Cur. adv. vult.

1937. March 22. The following judgments were read:—

Greer L.J. [whose judgment was read by Slesser L.J.:] The appellant, John Howard, the plaintiff in an action against Odhams Press, Ld., appeals against the judgment of Porter J. on the ground that the learned judge's finding that the appellant was only entitled to nominal damages was wrong, and he asks for judgment against the respondents, the defendants in the action, for the sum of 400*l.* which the judge estimated he would be entitled to if his finding that only nominal damages were recoverable was held to be wrong. The appellant's claim was a claim for damages for breach of a contract whereby the

(1) L. R. 1 H. L. 200.
(2) 1 Ex. D. 5.
(3) 39 Ch. D. 605.
(4) 6 Q. B. 308; 9 Q. B. 371.
(5) 45 Ch. D. 351.
(6) [1920] A. C. 956.
(7) [1901] A. C. 495.
(8) (1881) 6 Q. B. D. 333.

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respondents through their agent, a Mr. Cook, undertook not to use in any way against the appellant the contents of a written statement which he had made to Mr. Cook dated February 26, 1934, and that the contents of the document would not be divulged to a third party by Mr. Cook or by any one present at the taking of the statement. The statement further involved a confession by the appellant of fraudulent practices in connection with crossword competitions. The respondents gave notice of cross-appeal claiming that the judge was wrong in deciding that the appellant was entitled to any damages whatsoever, on the ground that the alleged agreement was void as contrary to public policy. On the hearing of the appeals this Court decided that they should be heard together. It was thought convenient that counsel for the respondents to the appeal, who were appellants on the cross-appeal, should in the first place put forward their arguments in support of the cross-appeal, and if he failed in convincing the Court he should then answer the appellant's arguments on the appeal, and in my opinion this is not only the logical, but the most convenient way of dealing with the questions involved in the appeal and cross-appeal, because if the cross-appeal succeeds it will be established that the alleged contract was illegal and void as contrary to public policy, and that the appeal must fail on the ground that so far from being entitled to substantial damages, the appellant plaintiff was not entitled to the nominal damages of 40*s.* for which the learned trial judge gave him judgment.

The appellant is a workman in the printing trade, and until he lost his membership as hereinafter stated he was a member of the National Union of Printing, Bookbinding and Paper Workers, a union which is an important and powerful body comprising in its membership nearly all the workers engaged in printing, bookbinding and paper works. It is not only an important and powerful union, but it is a union the membership of which is equivalent to a testimonial for honesty and respectability. The respondents, defendants to the action, are the printers of two papers called The People and the Daily Herald. It was proved in evidence that the respondents had for several years organized competitions in which

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large prizes were awarded to competitors who sent correct solutions to crossword puzzles. Up to some date in the year 1932 they had employed the appellant as a sorter in their competition department. Sorters appear to have been employed to sort the letters that were received from competitors for the various prizes, and their work gave them an opportunity, if they were inclined to be fraudulent and dishonest, of cheating their employers and the real winners of the competition by putting amongst the letters to be sorted a letter containing the correct solution after they had ascertained what the predetermined correct solution was. The respondents having received anonymous letters which made them suspect that this fraudulent cheating was going on amongst the sorters employed by them, decided to cause inquiries to be made so that they would be able to deal with those sorters who were ascertained to be guilty of those fraudulent practices. Through a private inquiry agent who had been a police-officer, named Bunn, they got into touch with the appellant and his wife. Mr. Cook, who was acting on behalf of the respondents, seems to have come to the conclusion that the appellant could help them to discover which of their employees had taken part in the swindling the defendants had been informed by anonymous letters was taking place. Before the document of February 26 was obtained from the appellant and his wife, they had orally made a communication to Mr. Cook to the same effect without any stipulation that the information so orally given was to be kept secret, but Mr. Cook wanted the statement reduced into writing. The appellant and his wife agreed to put their statement into writing subject to the proviso as to secrecy hereinafter mentioned. In para. 3 of the written statement the appellant admitted that he assisted a man named George Wood in a fraud whereby Mrs. Wood was able to put forward a false claim to a prize of 1000*l.* offered by the Daily Express, in whose employment the appellant was at that time. In his statement the appellant says Mrs. Wood got the money, and that he received 400*l.* as his share. The fourth paragraph of the appellant's written statement is in the words following: "4. In return for this

"Wood promised to do a similar thing for me in the Daily "Herald or People competition, but to date I have received "no further money of any kind from him." It was proved and was not in dispute that Mr. Cook on behalf of the defendants promised not to use the written statement to the detriment of the plaintiff, and not to divulge it to a third party.

There came a time when Mr. Cook was dissatisfied with the plaintiff's efforts to assist the defendants in discovering the persons who were carrying on the fraudulent practices in connection with the prizes offered by The People and the Daily Herald for success in their crossword competitions. He accordingly came to the conclusion that as the plaintiff was not performing his part of the contract, he, Mr. Cook, was free from the obligation of secrecy which he had undertaken with regard to the plaintiff's written statement, and on April 9, 1934, he gave to the secretary of the union a copy of the written statement. Thereupon the plaintiff and a number of other men were summoned to appear before the committee of the branch of the union to which they belonged. Rule 24 of the Rules of the union provided (inter alia) that members charging other members with any improper conduct as to the discharge of their duty which they could not prove should be fined such sum as the branch committee considered the case merited, but that the fine should not exceed 5*l.* When the plaintiff was summoned to the meeting of the branch committee he was summoned for making unfounded charges against fellow members of the union. Sub-rule 2 of Rule 24 provided that any member should be liable to exclusion from the union, and should forfeit all money paid thereto, inter alia, (*f*) if having knowingly acted to the detriment of the interests of the union. Rule 21, sub-rule 2, provided that members guilty of misconduct calculated to damage the character of the union should be dealt with at the discretion of the executive council. It looks as if the power of exclusion on the grounds stated in rule 24, sub-rule 2 (*f*), is vested in the executive council of the union and not in the branch committee; but no such point was made at the trial of the action, and though the defendants put in issue the plaintiff's allegation contained in para. 10 of the

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statement of claim, that the plaintiff was expelled from the union, when it came to trial it was not disputed that as a result of the finding of the branch committee the plaintiff was in fact expelled. It was not argued before us that the plaintiff had not been legally expelled. If the plaintiff had put forward the contention that the action of the branch committee in purporting to expel him was invalid under the Rules, the defendants might have met such a contention by establishing that though in the first instance the expulsion was the act of the branch committee, that act was subsequently confirmed by the executive council of the union; a letter which was read to us by counsel for the plaintiff seems to show that this in fact took place. I do not think it is open to the defendants to take advantage of the point raised by Slesser L.J. that the plaintiff was never expelled, and never lost his card of membership. It was common ground in the Court below that he had been properly dismissed. It was also common ground at the trial that the plaintiff had in fact lost his membership of the union, and his claim for damages was based on this assumption. I do not think it was open to counsel for the appellant to contend that he had never in fact lost his membership.

On the question whether the agreement was invalid as contrary to public policy, I was inclined at the end of the argument to take the view that inasmuch as it was an agreement for the purpose of assisting the defendants to prevent further frauds being committed, it was not against public policy, but was valid for the reasons given by Bankes L.J. and Scrutton L.J. in *Weld-Blundell* v. *Stephens* (1); but on consideration I have arrived at the conclusion, for the reasons stated by Greene L.J. in his written judgment, which I have had an opportunity of reading, that the agreement was invalid and contrary to public policy.

On the other question I am of opinion that the learned judge was right, that is to say on the assumption that the agreement was a valid agreement, and the defendants disclosed the plaintiff's confession in breach of their agreement, the learned judge was right in awarding only nominal damages,

(1) [1919] 1 K. B. 520; [1920] A. C. 956.

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because the damages the plaintiff sought to recover were due to his own wrongful act, that such act was the causa causans of the damage suffered by him by losing his membership of the union, and the defendants' wrongful disclosure of the confession was only the causa sine qua non. For reasons such as those which commended themselves to the three members of the Court of Appeal in *Weld-Blundell* v. *Stephens* (1), and to the House of Lords, as appears from their speeches in the same case, I think the learned judge was right in deciding that the causa causans of the plaintiff's damages was his own wrongful act, and that the disclosure of the confession was only the causa sine qua non. Slesser L.J. will cite in his judgment, which I have had an opportunity of reading, the words of Lord Sumner, Lord Dunedin and Lord Wrenbury in *Weld-Blundell* v. *Stephens* (2), which show that their Lordships took the same view on the question of damages as had been taken in the Court of Appeal.

For these reasons I agree that the appeal should be dismissed with costs, and that the cross-appeal should be allowed with costs.

SLESSER L.J. This is an appeal from the judgment of Porter J., who awarded the plaintiff nominal damages to the extent of 40*s.* without costs on a claim arising out of an alleged breach of contract. The agreement between the plaintiff and the defendants arose in the following way: It appears that the plaintiff, whose sometime duties included the handling and sorting of envelopes which contained solutions to competitions in newspapers owned by the defendants and other newspaper proprietors, was required, in order that he might pursue such employment, to be a member of a trade union known as the National Union of Printing, Bookbinding and Paper Workers; and it was not disputed that if he lost his membership in that trade union he would not be able to obtain further employment in the trades with which the union was concerned.

He was first employed by the defendants as a sorter in the

(1) [1919] 1 K. B. 520; [1920] A. C. 956. (2) [1920] A. C. 956.

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competition department in 1928 and continued that work until the spring of 1932. In the autumn of 1933 he was employed by another newspaper. Thereafter he was unemployed, but continued to be a member of the trade union until April 18, 1934. During 1933 the defendants had reason to believe that frauds were being carried out in connection with the competitions, and at the end of that year or at the beginning of 1934 under suspicious circumstances a certain Mrs. Watson, of Hastings, won a prize. A cheque which had been sent to her was stopped, and though asked to establish her claim, she had failed to do so. It was thought by the defendants that this Mrs. Watson was a sister-in-law of the plaintiff. This ultimately was found not to be the case; but, nevertheless, on February 26, 1934, the plaintiff and his wife met the general manager of the newspaper called The People, a Mr. Cook, with regard to the whole question of the suspected dishonest dealings. The plaintiff had already made oral statements as to his knowledge of these matters to a detective employed by the defendants called Bunn, and on the 26th the plaintiff made this further statement to Mr. Cook, which was written out, and on being asked whether he had any objection to signing it, he said "No," but, in his own words: "I impressed on Cook that it would be serious if "I made the statement and it got to the trade union and that I "might be expelled if it got to their notice; thereupon Mr. Cook "said he would insert a paragraph to protect me." The statement which the plaintiff signed alleged among other facts that on joining the staff of the Daily Express newspaper, that is in 1933, he was approached by one J. W. to work with him in obtaining the Daily Express crossword prize of 1000*l.* for a Mrs. W. Up to that time, the plaintiff added, he had had no transactions whatever in connection with competition swindling. W. then instructed him what to do. He was given a prepared letter to include in the Daily Express entries, which he was to put among the late post; later it was held to be the only correct entry. Mrs. W. got the money and he duly received a share. He said that he was promised half, but they told him that 100*l.* had to be given to a postman. In return for this dishonest work of the plaintiff W. promised to do a similar thing for him in the Daily Herald or People competition and also to put an entry in for the plaintiff's wife in the name of his wife's mother, in order to get a share of the 2500*l.* radio prize. The plaintiff went on to explain in his statement how the "competition "swindle," as he called it, is worked, the basis being that in the case of coupons three of the entries are filled in, leaving the fourth to be completed after the official solution has been published in the paper. The envelope is then closed and handed to a confederate, who puts it into the competition by some device which enables it to be introduced among the original entries. He added that there were at least three "schools" in the Daily Herald and People staffs working this swindle regularly every week, and he gave names of various guilty persons and added that there was an organization for arranging accommodation addresses to promote the swindle throughout the country. The names of the agents were also given. Then at the end of the statement he added: "I am making this statement on the definite understanding "that it is not to be used in any way against me and that it "will not be divulged to a third party by any one present at "the taking of my statement. I agree that should as a result "of this information it be possible for any steps to be taken to "clear up this competition swindle, I am prepared, should I "be asked, to consider allowing this statement to be used, on "one condition, that the reference with regard to the Daily "Express is not communicated to them or used against me or "my wife in any way." The plaintiff also agreed orally to help the defendants to find out the perpetrators of swindles in past competitions and in return for this service, the detail of which was further arranged at another interview on February 28, 1934, the defendants promised to help the plaintiff and his wife with money. This promise of information and assistance has been held by the judge to be an independent promise, given in return for promised reward and not an expressed or implied term of the promise to keep secret the statement, and this finding has not been challenged in the present appeal.

The plaintiff failed to give the defendants any further assistance, but disappointed that he was getting no money or other reward he wrote letters to Mr. Cook and later to a Mr. Elias, who is chairman and managing director of the defendant company, complaining of want of assistance and threatening to make the whole matter public. This last was on April 6, and although Mr. Cook said in evidence that when the statement was made he intended to keep the promise not to divulge it and knew of the great hurt it would be to the plaintiff if it became known to the trade union, on April 9 he sent the plaintiff's statement to the trade union, breaking his promise, as he said, because he had changed his view of the plaintiff's bona fides: as a result of the three letters and a further report from the detective Mr. Bunn, Mr. Cook had come to the conclusion that the plaintiff never really intended to assist him, and that he wished to use his contract to assist in the perpetration of further frauds.

As a consequence of the disclosure, the plaintiff was summoned to attend a meeting of his branch committee of the union, the London Central Branch. He went to a meeting of the executive committee of the branch on April 12, when, according to him, the chairman said: You are summoned here to-night "on a "signed statement given to Mr. Cook to answer charges made by "you against other members," and Mr. Larcey, the secretary of the branch, says that "the plaintiff was told that he was present "with reference to charges put up by the plaintiff and other men "with regard to the People competition."

By rule 24, sub-rule 1, of the Rules of the trade union, a member charging another with any act of improper conduct which he cannot prove shall be fined such sum as the branch committee shall consider the case merits, but the fine shall not exceed 5*l*. There is little doubt that the questioning before the branch, on the plaintiff's own admission, went into matters other than the charging of other members; for example, he was asked about Mrs. Watson and generally about his statement to Mr. Cook. Before the committee thirteen other members were also charged and examined in connection with the frauds, and they were all tried separately. The plaintiff was cross-examined as to his participation in what was supposed to be going on in the Herald office, the union trying to find out the truth with a view to co-operating with the employers to put a stop to the fraudulent practices. The trade union secretary, Mr. Larcey, said in evidence that Wood and Morris were examined in the plaintiff's presence and that the plaintiff admitted that he was guilty of fraud. In the result, the branch found the plaintiff guilty of the charge he was called on to meet and other charges, and the result was communicated to him in the following terms on April 18, 1934: "At their meeting last evening, the branch "committee went fully into the matters that were discussed with "yourself and others at their special meeting held on Thursday "last and have decided to carry out general rule 24, misconduct "of members, and exclude you from the union, you having "knowingly acted to the detriment of the interests of the union. "I have therefore to inform you that your card of membership "will be of no further use to you." This decision appears to have been made under rule 24, sub-rule 2 (*f*), which provides that any member shall be liable to exclusion from the union and shall forfeit all money paid thereto "if having knowingly acted to the detriment of the interests of the union." As a matter of strict constitutional propriety, I think it is very doubtful, when those rules are considered as a whole, whether the branch had any power at all to expel the plaintiff. When the branch is given specific disciplinary powers they would appear to be mentioned, as, for example, the power to fine in rule 24, sub-rule 1, and rule 14, sub-rule 5, and to suspend from benefit under rule 21, sub-rule 1, and rule 20, sub-rule 5. The power to accept or refuse applications for membership, honorary or otherwise, under rule 14, sub-rule 3, or rule 18, sub-rule 6, is said to be in the branch committee subject to decision of the executive council; but rule 21, sub-rule 2, provides in terms that members guilty of misconduct calculated to damage the character of the union shall be dealt with at the discretion of the executive council, whose decisions are binding on all the members subject to an appeal to a delegate council, rule 3, sub-rule 12, and rule 35 (Powers of Branches) is silent as to any power of expulsion. We were informed, in fact, that the executive council in this case purported to endorse the decision of the branch committee; but there is no evidence that the plaintiff had a fresh or any hearing before them, and if they alone had the power, as I think, to expel him, he was entitled to be tried, after hearing, by those who alone could exercise the power and not by any extraneous or subordinate body: see *Walton* v. *Yorkshire Miners' Association.* (1) Rules as to expulsion must be strictly complied with: *Young* v. *Ladies' Imperial Club.* (2) But in the present case this matter does not really fall to be decided; for good or ill, properly or improperly, the branch did purport to expel this member from the trade union, and it would only be on an assumption that he was entitled to damages for loss of his employment by ceasing to be a member of the union that this further question, whether he could complain as against the defendants that a wrong body had arrogated to itself the attempted power to expel him, could arise. In my view, for the reasons which I shall hereafter state, the plaintiff cannot succeed against the defendants on any view, and therefore I do not further discuss the matter.

The learned judge has come to the conclusion that the contract between the plaintiff and the defendants whereby in consideration of their secrecy he gave them certain statements is enforceable at law, but he has further come to the conclusion that no damage other than nominal follows from that breach. On this view, as to the quantum of damage, the plaintiff appeals, but the defendants cross-appeal and say that in law the whole agreement is illegal as being an agreement, to quote the words of Lord Lyndhurst in *Egerton* v. *Brownlow* (3), "having a "tendency to affect the administration of public justice." To decide this preliminary question, thus raised in the cross-appeal, it is necessary first to form a judgment as to the exact scope and intention of the written statement which the plaintiff signed. It is clear, in the first place, that it speaks not only of past swindling done by the plaintiff and others, but speaks, in para. 4, of proposals to continue a similar iniquity in the Daily Herald and People competitions and in the

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(1) Times Newspaper, March 8, 1921.

(2) [1920] 2 K. B. 523.

(3) 1 H. L. C. 1, 163.

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case of the radio prize. The competition swindle, as it is called, is explained and is said to be being presently worked by at least three "schools" in the Daily Herald and the People competition department staffs, and, it is further alleged, there is an organization continuing for arranging accommodation addresses. It impliedly contemplates also a concealment of the facts of the fraud so far as they appear in the statement from the proprietors of other newspapers who had been cheated, such as the owners of the Daily Express. On these facts I think that the case falls within the observation of Warrington L.J. in *Weld-Blundell* v. *Stephens* (1) to the effect that "if the document in question revealed a contem- "plated crime, the commission of which its disclosure might "prevent, I think there would be a duty owing to the public "which would override any private obligation." The view there expressed by the learned judge, though obiter in that case, seems to me to be right on general principle and consistent with authority. The perversion of the administration of justice may take place in many different ways. The concealment or procuring the concealment of a felony known to have been committed is misprision, which is a misdemeanour at common law (1 Hawkins P. C., ch. 20, p. 59; 3 Coke's Institutes, p. 139); but apart from this, an agreement not to prosecute or to stifle a prosecution is unenforceable, for, in the language of Lord Westbury in *Williams* v. *Bayley* (2): "If you are aware that a "crime has been committed, you shall not convert that crime "into a source of profit or benefit to yourself. . . . . If men were "permitted to trade upon the knowledge of a crime, and to "convert their privity to that crime into an occasion of advan- "tage, no doubt a great legal and a great moral offence would "be committed." The principle has been extended to agreements between a prosecutor and persons indicted, that a proposed witness should not give evidence at a trial for reward: *Collins* v. *Blantern.* (3) As is there said by Wilmot C.J.: "This "is a contract to tempt a man to transgress the law, to do that "which is injurious to the community; it is void by the common

(1) [1919] 1 K. B. 520, 533; [1920] A. C. 956.

(2) L. R. 1 H. L. 200, 220.

(3) (1767) 2 Wilson, 341.

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"law." So also an agreement to compromise pending legal proceedings is illegal if the offence be of a public nature: *Keir* v. *Leeman* (1) and *Windhill Local Board of Health* v. *Vint.* (2) In this latter case there are observations both by Cotton L.J. and by Fry L.J. which are important having regard to the argument which is here addressed to us on behalf of the plaintiff, that this information given to the defendants would be of public benefit in that it would enable them to stop further frauds (although, as was stated in the evidence, Mr. Cook told the plaintiff that it might hurt Odhams if the public knew that there were frauds in connection with the competitions, and that they were very desirous that the frauds should be kept secret) and so serve the public interest. But, even accepting the view that it might be said that it was in the public interest that the statement should be made, it is important to have regard to what Cotton L.J. said in the *Windhill* case (3)—namely, that "The Court "will not allow as legal any agreement which has the effect of "withdrawing from the ordinary course of justice a prosecution "when it is for an act which is an injury to the public. It would "be the case of persons taking into their own hands the "determining what ought to be done; and that ought not to be "taken into the hands of any individuals, even if they are a "quasi public body like the Plaintiffs here, but ought to be left to "the due administration of the law, and to the Judges, who can "determine what in the particular case ought to be done," and to what Fry L.J. there said (4): "It is said that the principle "does not apply where the benefit secured by the agreement is a "benefit to the public, and not to some private individual. I am "of opinion that no such exception can be made. . . . . I do not "think that the prosecutor is at liberty to weigh the advantage to "the public in continuing the prosecution against the advantage "of some sum of money or of something else being done for the "public, and that he has no right to put those two things into the "balance and determine in favour of the one as against the other."

It may be said that the particular facts on which this agreement is said to be illegal are not those precisely of stifling a prosecution or compounding a crime; but the agreement would in my opinion have the necessary effect of restricting the opportunity which the defendants and others might otherwise possess to assist the authorities in the investigation of, and, if necessary, in the prosecution of the alleged crimes. Perhaps one of the nearest decided cases to the present—in which there was an agreement that if a defendant would not expose and make public the conduct of the plaintiff in adultery he would not sue on a bond—is to be found in *Brown* v. *Brine* (1), where, the Court holding such an agreement to be illegal, Cleasby B. said (2): "The consideration for the promise "to give up the bond must either be a benefit to the promisor or "some prejudice to the promisee. What is the benefit in this "case? It is the benefit derived from the deceased keeping "certain events secret, and that is the same thing as depriving "the public of the knowledge of the truth, and of the opportunity "of acting upon it. It is only, therefore, a benefit to the plaintiff "so far as it would be material to the public to know the "circumstances," and per Kelly C.B.: "The forebearance to commit such a breach of duty cannot be made the consideration for a "promise." In *Crampton* v. *Green* (3) it was held that a promise not to give evidence before the House of Lords in relation to a certain line of railway without the consent of certain parties was illegal. In the language of Patteson J.: "The words are that he "will not give evidence. If, therefore, the Speaker issued his "warrant for his examination on the other side, he must run "away." Finally on this head I would mention the case of *Lound* v. *Grimwade* (4), where A gave B a bond to secure 300*l*., the evidence showing that the consideration included an agreement that certain criminal proceedings against him should be conducted in such a way either that A's name should not be mentioned, or that, if mentioned, he should be exonerated from all blame in connection with the proceedings. Stirling J. quotes Lord Lyndhurst in *Egerton's* case (5) in the passage to which I have already referred, and adds: "Upon this principle it has

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(1) 6 Q. B. 308; 9 Q. B. 371.
(2) 45 Ch. D. 351.
(3) 45 Ch. D. 363.
(4) 45 Ch. D. 351, 365.

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(1) 1 Ex. D. 5.
(2) Ibid. 7.
(3) 10 L. T. (O. S.) 442.
(4) 39 Ch. D. 605.
(5) 1 H. L. C. 1, 163.

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"been repeatedly held that agreements tending to affect the "course of legal proceedings are illegal, even although those "proceedings may not be strictly criminal in their nature"— a fortiori, if they are criminal.

Counsel for the plaintiff, however, relied upon certain observations of Scrutton L.J. in the *Weld-Blundell* case. (1) The Lord Justice, following Warrington L.J., in pointing out that in that case there was no reason to suppose that the libel involved criminality, added (1): "I do not think it necessary in this case to consider whether a plaintiff who has committed an act punishable criminally can ever recover damages "based on his liability for that criminal act," and adds: "I do "not at present see that an agreement to take precautions to "prevent a man committing a crime is in any way contrary to "public policy." That dictum does not seem to me to apply in the present case, for, on Mr. Cook's admission, the statement was agreed to be kept secret in order not to hurt Odhams by the publicity which a disclosure to the police or the public might bring about. This statement, obligatory of secrecy, was to be concealed not only in order not to expose an existing crime, but did, I think, tend to discourage the revelation of contemplated crime, though possibly not committed by the plaintiff. Its motive was primarily to protect the reputation of the defendants, which might well suffer from exposure of the facts, and I see no reason, on the evidence of Mr. Cook, to come to any other conclusion but that if the prevention of further crime had involved such public exposure, he would have hesitated to inform the police and so possibly defeat his primary object of concealment. At any rate, I think, on the facts of this case, it is impossible to say that any public policy of prevention of crime countervailing the prima facie illegality of the contract can be established, and I do not view the agreement as one to take precautions to prevent a man committing a crime within the meaning of Scrutton L.J.'s dictum, but rather as an agreement to prevent the public knowing that crimes had been, or would be, committed.

The learned judge has come to the conclusion that the

(1) [1919] 1 K. B. 520, 539.; [1920] A. C. 956.

agreement was not unenforceable. He thinks that the condition might impose an obligation to disclose the statement to the police, but appears to disregard the fact that it is not only the plaintiff's past wrongdoing, but the conspiracy as to continuing and future frauds which is involved. The learned judge does not mention the dictum of Warrington L.J. in the *Weld-Blundell* case. (1) He agrees that an agreement to pay either directly or indirectly for non-disclosure of a crime is against public policy; but here, though there was no actual payment, yet one of the benefits which Mr. Cook derived from the matter was a concealment which he admitted was very much in the interests of his newspaper. In my judgment, on all the facts, it was in the public interest that nothing should be agreed by the defendants which might have the effect of preventing the authorities knowing the facts. In my view, the learned judge was wrong in holding that this agreement was enforceable in law and consequently the cross-appeal should succeed.

In deference to the interesting argument of Mr. Richard O'Sullivan, however, I think it right, although my decision on the question of legality really determines the whole matter, to express an opinion upon his contention that, assuming the agreement to be valid, damages other than nominal should be awarded. The learned judge has come to the conclusion on this matter that the case is covered by the decision of the House of Lords affirming the Court of Appeal in *Weld-Blundell* v. *Stephens* (1), and I agree with him. So far as concerns the House of Lords, the decision was given in part upon a matter which does not here directly arise—namely, the failure of the plaintiff to show that his loss was due to the wrongful acts of the defendants, there being in the opinion of the majority of the House of Lords a novus actus interveniens to be gathered from the fact, in the language of Lord Sumner, that (2): " If, however, the damages, of which evidence was "given, were not simply caused by the appellant's publication "of the libel, they arose in actions directly and immediately

(1) [1919] 1 K. B. 520; [1920] A. C. 956.
(2) [1920] A. C. 956, 982.

"brought about by the intervention of Mr. Hurst. . . . . The "responsibility of Mr. Stephens ended with Mr. Swift, his partner, "who was careless but did not drop the letter intentionally. "No authority was given by Mr. Stephens to Mr. Hurst in the "matter. It was never intended that he should read or make "use of the letter." But in addition to this view, Lord Sumner further points out as an additional reason (1) : " either the "sums which the appellant had to pay were the direct result "of what he did himself and were self-inflicted injuries, or they "were caused not by Mr. Stephens but by Mr. Hurst." Dealing with the first matter, he says : " The appellant's liability did "not depend on or spring from Mr. Stephens, unless a mere "occasion is identified in law with cause. The way in which "the appellant must naturally and necessarily state his case "seems to me to put this view in a nutshell. 'True it is,' he "says, 'that I libelled Messrs. Comins and Lowe to Mr. Stephens; "'but, if Mr. Stephens had not lost my letter, they would have "'known nothing about it, and I should have escaped the "'consequences of my own wrongdoing.' My Lords, what is "this but saying in plainer language : 'My own act was the "'causa causans of the judgment against me, and Mr. Stephens's "'omission to be careful was the causa sine qua non.' From the "moment when the libel was published the appellant was under "legal liability, and the effect of the action was merely to ascertain its amount and to compel the appellant to discharge it." So here, I think it right to say that from the moment the plaintiff did the wrongful acts he admits, he was under liability to be expelled from the trade union and that the effect of the action of the defendants was merely to prevent him escaping the consequences of his own wrongdoing. Lord Dunedin in the *Weld-Blundell* case thinks (2) that the matter had already then been decided in the case of maintenance in *Neville* v. *London "Express" Newspaper* (3), where in his view a similar principle was applied. Speaking of *Neville's* case (3) he says (4): " It was found by the majority in this House that the "maintenance of the action was wrong against the plaintiff

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(1) [1920] A. C. 956, 981.
(2) Ibid. 977.
(3) [1919] A. C. 368.
(4) [1920] A. C. 956, 997.

"although the maintained action was successful. Once it was "successful the natural and probable consequence was that the "plaintiff had, as a defendant in action, to pay the sums found "due. Yet he was not entitled to recover the same as special "damage." He speaks (1) of the underlying proposition that " no man can claim damages when the root of the damage "which he claims is his own wrong." And Lord Wrenbury to the same effect says (2): " Weld-Blundell's liability to pay "money to Lowe and Comins, however, arose not from that "negligence, but from his own wrongful act in indulging in "malicious libel. . . . . It was not causa causans but at most "causa sine qua non." A similar view had been expressed by the majority in the Court of Appeal, where it had been held that the plaintiff could recover nominal damages and no more for the breach of the duty to keep secret a letter of instructions which contained the libel, any further damages being in the nature of an indemnity for the consequences of his own wrongdoing.

To sum up, I think here that the learned judge was right in applying that principle to the present case. The exclusion of the plaintiff from the trade union, assuming he has been excluded, and his consequent loss of employment is due to the fact that he had knowingly acted to the detriment of the trade union whose interests, among others, may fairly be said to include the maintenance of honesty among the members and in their dealings with their employers.

In the final result, the cross-appeal succeeds and the appeal stands dismissed.

GREENE L.J. These are two appeals from a judgment of Porter J., sitting without a jury, whereby the plaintiff in the action was awarded 40*s*. damages without costs. The main appeal is by the plaintiff, who asks for that judgment to be set aside and in lieu thereof that judgment may be entered in his favour for 400*l*. with costs. In the cross-appeal the defendants ask for judgment with costs.

The plaintiff's claim in the action is for damages for breach of contract and it arises in unusual circumstances. The defendants are the printers and publishers of two newspapers, John Bull and The People, and they are the printers of a third newspaper, the Daily Herald. These newspapers have been in the habit of organizing crossword puzzle competitions among their readers, substantial prizes being offered for the correct solution of the puzzles. The defendants had reason to suspect that systematic frauds were being practised in connection with these competitions, and they were anxious to discover how these frauds were perpetrated and who were the persons concerned in them. In these circumstances the defendants got into touch with the plaintiff early in February, 1934, in the first place through a detective employed by them, named Bunn, and a little later through one Cook, the manager of their competition department. The plaintiff had previously been employed by the defendants in their competition department, but had left their employment about the year 1931. The reasons which led the defendants to approach the plaintiff were as follows. In one of the competitions a Mrs. Watson, with an address at Hastings, was apparently the winner. The defendants suspected that a fraud had been committed and they stopped the cheque for the prize money which had been sent to her. Now the defendants had been told (incorrectly, as the plaintiff subsequently informed them) that this Mrs. Watson was a sister-in-law of the plaintiff, and accordingly they thought that useful information with regard to this and other suspected frauds might be obtained from him. It so happened that the plaintiff was in a position to give this information. He had himself taken part in a fraud in connection with a crossword puzzle competition organized by the Daily Express newspaper and knew the method by which frauds of this description were carried out. He also knew the names of several members of organized gangs among the employees of the Daily Herald and The People who were regularly carrying out these frauds.

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(1) [1920] A. C. 976. (2) Ibid. 998.

The plaintiff was seen by Bunn on February 22 and 23, 1934, when he verbally gave him the substance of the information in his possession. On February 26 the plaintiff was seen by Cook at the Waldorf Hotel and verbally gave him the information contained in the statement which he afterwards signed. Cook asked him if he would sign a statement setting out the information which he had given. The plaintiff was willing to do this on condition that it should contain a promise by Cook not to divulge its contents to any third party, and to this Cook agreed. The plaintiff explained to Cook his reason for asking for this promise. It was that the plaintiff was a member of the National Union of Printing, Bookbinding and Paper Workers, and that if the contents of his statement came to the knowledge of the union he would very probably be expelled from the union, and this would mean that it would not be possible for him to obtain work in his trade. The plaintiff in his evidence stated that Cook impressed upon him that it might hurt the defendants if the public knew that there were frauds in connection with these competitions; that the defendants were very desirous that they should be kept secret since the interest of the papers was at stake; and that each wanted secrecy. The learned judge, if I understand his judgment rightly, accepted this evidence and I see no reason for differing from him. It is, I think, quite certain that Cook in giving the promise of secrecy did so with the full intention of keeping it—indeed, he so admitted in the witness-box. But his motive in giving it was to obtain in writing a statement which would enable him to protect his employers against these frauds, and he had no intention of using it for the purpose of bringing any of the persons concerned in them to justice.

The statement which was signed by the plaintiff and his wife and witnessed by Bunn contained the following information: 1. Particulars were given of a fraud which had been worked by one Wood in conjunction with the plaintiff in the case of the Daily Express competition. Out of the proceeds of this fraud the plaintiff stated that he had received 400*l.* 2. A statement was made with regard to two further proposed frauds in which the plaintiff was to share, but which, so far as the plaintiff was concerned, had not as yet been committed. 3. Detailed particulars were given of the method by which frauds of this description were perpetrated. 4. It was said that there were at least three "schools" in the Daily Herald and The People competition department staffs working the swindle regularly every week and the names of certain individuals suspected by the plaintiff to belong to these "schools" were given. The promise of secrecy is to be inferred from Mr. Cook's acceptance of the following passage: "I "am making this statement on the definite understanding that "it is not to be used in any way against me and that it will "not be divulged to a third party by any one present at the "taking of my statement. I agree that should, as a result of "this information, it be possible for any steps to be taken to "clear up this competition swindle, I am prepared, should I be "asked, to consider allowing this statement to be used—on one "condition—that the reference with regard to the Daily "Express is not communicated to them nor used against me "or my wife in any way."

On April 9, 1934, Cook being (for reasons which it is not material to state) dissatisfied with the plaintiff, handed the statement which the plaintiff had signed to the branch secretary of the plaintiff's union. In doing so, Cook was admittedly guilty of a breach of the undertaking which he had given as to secrecy, and it is for damages for breach of this undertaking that this action (so far as concerns these appeals) is brought.

The consequences of this disclosure were serious. On April 12 the plaintiff and a number of other men were brought before the committee of the London central branch of the union to which they belonged and the plaintiff along with others was expelled from the union. Written notice of expulsion was served on the plaintiff on April 18. As the result of this expulsion the plaintiff has been and still is unable to obtain work in his trade since for that purpose the possession of a card of membership of the union is essential. The plaintiff moreover forfeits his right to the benefits to which members of the union are entitled under its Rules.

During the course of the argument a question arose as to the power of a branch committee under the Rules of the union to expel a member. But the action was throughout conducted on both sides upon the footing that the expulsion was effective, and accordingly I do not think it necessary to consider this question. In any case, even if the sole power of expulsion rests with the executive council of the union so that the order of expulsion made by the branch committee is technically inoperative, I think that in the circumstances the inference ought to be drawn that if the plaintiff is still technically a member of the union he will certainly be expelled.

In the circumstances above stated, two questions arise for decision. The first, which is raised upon the cross-appeal and logically must be considered before the other, is whether the undertaking given by Cook not to disclose the contents of the plaintiff's signed statement is, as the defendants contend, void as being against public policy. The second, which is raised by the main appeal, is whether, if the undertaking is a valid one, damages are recoverable for the loss sustained by the plaintiff by reason of his expulsion from the union, or whether he is only entitled to nominal damages for the defendants' breach of their undertaking. The learned judge decided the first question in favour of the plaintiff. He construed the undertaking, rightly, as I think, as imposing an obligation not to disclose the contents of the statement to the police although its primary object was to conceal them from the plaintiff's union. The undertaking, in my opinion, goes further, and by giving it the defendants precluded themselves from using any of the information given in connection with any prosecution of the plaintiff or any other guilty parties; for example, by communicating any of its contents to solicitors or counsel employed in a prosecution of any guilty party, although I agree with the learned judge that the undertaking would not cover the case where the defendants were compellable to testify or to produce the document by due process of law. The learned judge held that the undertaking was merely a promise to keep information secret in return for the revelation of matters which it was in the public interest that the defendants should know, and he held that it was not void as being against public policy.

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The second question was decided by the learned judge in favour of the defendants. He held upon the authority of *Weld-Blundell* v. *Stephens* (1) that the loss suffered by the plaintiff through expulsion from his union was not caused by the defendants' breach of their undertaking but by his own wrongdoing, and accordingly he awarded to the plaintiff nominal damages only. In the event of his view upon this question being incorrect he assessed the damages at 400*l.*, which is the sum for which the plaintiff asks for judgment in the main appeal.

I will deal first with the question which arises on the cross-appeal. It is, I think, clear from the evidence and the findings of the learned judge that Cook's motive in obtaining the statement from the plaintiff and in giving the promise of secrecy without which it could not have been obtained was a desire to protect the defendants by putting a stop to the frauds. He had no desire or intention to place the information obtained in the hands of the police or to use it in any way for the purposes of a prosecution. I do not, however, think that in a question whether or not a contract is void as being against public policy the motives of the parties in entering into it are to be considered. The crucial matter is the tendency of the contract itself—will it, if carried out according to its terms, operate to the public detriment? The application of this test to the circumstances of the present case is not easy. The information contained in the statement had already been given verbally without any promise of secrecy on Cook's part. It was only when Cook asked for a statement in writing that the plaintiff insisted upon the promise. It is not, I think, clear whether that promise upon its true construction extends to the information verbally given, although my own view is that it does. But, however that may be, the statement, being in writing, was a valuable document, and, even though in the circumstances it probably would not have been admissible in criminal proceedings against the plaintiff, it would have been extremely useful in the hands of the police or in those of solicitors or counsel engaged in a prosecution of the plaintiff and the other members of the gang who were in the defendants' employment. The effect of the promise of secrecy was to sterilize this document in the defendants' hands. In the circumstances, however, I doubt whether, if the frauds in question had only been directed against the defendants, the undertaking would have been against public policy. It is true that, so far as the defendants alone are concerned, the undertaking applies to frauds already committed against them by the plaintiff and others, and to such further frauds as might be committed against them before the operations of the gang could be effectively brought to an end. To this extent the promise may be said to be a promise not merely not to disclose a statement relating to crimes actually committed, but also not to disclose a statement relating to crimes which might be committed in the future. "I do not agree," said Bankes L.J. in *Weld-Blundell* v. *Stephens* (1), "that a contract not "to disclose the fact that a crime has been committed is neces- "sarily either illegal or against public policy." In the same case Warrington L.J. said (2): "If the document in question "revealed a contemplated crime, the commission of which its "disclosure might prevent, I think there would be a duty owing "to the public which would override any private obligation." In these passages the case contemplated is, I think, a more simple one than the present. In the present case the defendants, by obtaining the statement, were obtaining something which would be useful to them and which they intended to use for the purpose of preventing the commission of future frauds against themselves; and it was only by giving the promise of secrecy that they were able to obtain it. If the matter had stood there I should have inclined to the view that there was nothing against public policy in the undertaking. But the statement is not a mere statement as to frauds already committed against the defendants or as to possible future frauds against them which the possession of the statement would enable them, by themselves taking action, to prevent. It contained in addition the following matters: (*a*) information as to a fraud already committed by the plaintiff and Wood

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(1) [1919] 1 K. B. 520; [1920] A. C. 956.

(1) [1919] 1 K. B. 520, 528; [1920] A.C. 956. (2) [1919] 1 K. B. 533.

against the Daily Express with which the defendants had no concern; (*b*) information as to a contemplated fraud in connection with the "Radio" prize, which I do not understand to have been a prize offered by the defendants; (*c*) information, of a quite general character and not confined to the defendants' competitions, as to the method of working crossword competition swindles, a method, if I construe the statement correctly, in regular use. Now the effect of the promise of secrecy was this. The defendants were precluded by it from divulging the statement to the Daily Express or to any other newspaper concerned, and thus assisting them by means of the information which it contained to prevent the commission of future frauds against themselves or to secure the conviction of the guilty parties who had defrauded them in the past. Indeed, the defendants were not concerning themselves with any competition but their own, nor did they wish to protect any one but themselves. It may well be permissible for a person against whom frauds have been and are intended to be committed to give a promise of secrecy in order to obtain information relating to them which will enable him, by taking steps himself, to prevent the commission of future frauds. I do not, however, think that such a promise ought to be held to be valid where it extends to frauds committed and contemplated against others to whom the communication of the information obtained would be of use in preventing the commission of such frauds. The effect of obtaining the statement under cover of the promise was to assist the defendants indeed to protect themselves; but the effect of the promise was to preclude the defendants from disclosing to others written information as to a systematic system of fraud which was said to be regularly put in practice against them. The defendants were protecting themselves, and as a condition of obtaining that protection they were leaving others exposed to criminal activities which the disclosure of the statement might bring to an end. For these reasons, although the point is, in my opinion, a difficult one, I have come to the conclusion that the promise of secrecy is void as being against public policy. If my opinion on the question raised by the cross-appeal is right, the main appeal cannot succeed. But as it has been argued at length, it is right that I should express my views upon it.

Before I consider the questions of law involved, it is necessary to examine certain aspects of the facts a little more closely. Under rule 24 of the Union Rules, which is headed "Mis-"conduct of Members," it is provided in para. 2 that "any "member shall be liable to exclusion from the Union and "shall forfeit all money paid thereto . . . . (*f*) if, having "knowingly acted to the detriment of the interests of the "Union." It was, I think, clearly under this provision that the plaintiff was expelled, although it appears that the supposed offence in respect of which he was actually summoned before the committee was a different one involving at most a fine under rule 24, para. 1. It is also, I think, clear that the particular acts detrimental to the interests of the union which led to his expulsion were the frauds actual and contemplated in which he had personally been concerned with Wood, who was also a member of the union and was expelled at the same time. The position, therefore, was that by being concerned in these frauds he had put himself in a position in which, according to his contract of membership, he was liable to suffer deprivation of his contractual rights by expulsion. This liability was the result of his own wilful acts, and it arose the moment that he committed them. The effect of the defendants' breach of contract was to bring to the knowledge of the union the facts giving rise to this liability and thus to place the union in a position to enforce it. It is said on behalf of the plaintiff that the loss which he suffered is not only the natural and probable result of the defendants' breach of contract, but was actually contemplated by the parties as likely, if not certain, to occur; that although a man cannot in the shape of damages for breach of contract claim an indemnity for the loss occasioned by his own crime or wilful tort, this rule has nothing to do with causation of damage, but is a substantive rule of law and is moreover confined to cases where the damage suffered is that occasioned by legal proceedings by way of prosecution or an action for damages (as the case may be), and in any event does not extend to cases where the damage

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suffered resulted from a breach of contract or some diminution of contractual rights.

It is necessary, at this stage, to examine two decisions of the House of Lords which bear closely upon these questions. The first is *Neville* v. *London "Express" Newspaper, Ld.* (1) In that case the plaintiff sued the defendants for damages for their maintenance of an action of deceit which had been successfully brought against him by a number of individuals. The House held by a majority that an action for damages for maintenance will not lie in the absence of proof of special damage; but all members of the House concurred in holding that the loss suffered by the plaintiff in having to pay damages to the persons defrauded could not be treated as damage consequential on the maintenance of the action in which they were recovered. It is instructive to see the reasons given for this opinion. Lord Finlay L.C. said this (2): "In the "present case there is no damage. The plaintiff, it is true, has "had to repay money which he had obtained by fraud and to "pay costs in respect of his having resisted payment. It cannot "be regarded as damage sufficient to maintain an action that "the plaintiff has had to discharge his legal obligations or that "he has incurred expenses in endeavouring to evade them." Lord Atkinson, speaking of the loss caused by a successful maintained action to recover a debt or damages, said (3): "The invasion of this right [that is, the right not to be harried "by maintained litigation] does not create the liability (that is, "to pay the debt or damages) in either case. It existed independently of it. . . . . It appears to me that a debt which a "debtor is forced by litigation to pay cannot properly be called "damages. . . . ." I read the decision on this point as one based, and based only, on the proposition that the damage alleged did not flow from the breach of contract. I do not accept the view that the principles enunciated in it are to be limited to cases where the damage complained of is caused by the recovery of a judgment for debt or for damages for tort, although these were the examples which were specifically

(1) [1919] A. C. 368.
(2) Ibid. 368, 380.
(3) [1919] A. C. 395, 396.

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referred to. Nor, in view of what is said in the case to which I shall next refer, can I treat this decision as limited to actions in which damages for maintenance are claimed. I may adapt the words of Lord Atkinson which I have quoted above to the circumstances of the present case by saying that the defendants' breach of contract did not create the plaintiff's liability to lose his contractual rights as a member of his union. That liability existed independently of the defendants' breach of contract.

The other case is *Weld-Blundell* v. *Stephens* (1), and I shall confine myself to a short examination of the opinions of the noble and learned Lords who formed the majority in that decision. The plaintiff had written a libel which by reason of the carelessness of the defendant, his professional adviser, had been picked up by a third party, one Hurst, and shown by him to the individuals libelled. No question arose in the House of Lords as to the existence of an implied obligation on the defendant to keep secret the plaintiff's private letter to himself in which the libel was contained; and the libel was treated as merely tortious and not criminal. The plaintiff, having been compelled to pay damages to the persons libelled, sought to recover from the defendant damages for the loss which he had suffered by reason, as he said, of the defendant's breach of the implied obligation of secrecy. It was held that the only damages to which he was entitled for that breach were nominal. There were two main grounds for the decision. One was that the damage caused to the plaintiff was due to a novus actus interveniens—namely, the act of Hurst in showing the libel to the persons concerned. This reason has no bearing on the present case. The other reason, however, has a close bearing upon it and in my opinion is conclusive. Lord Sumner (2) states the dilemma. He said: "My Lords, "either the sums which the appellant had to pay were the direct "result of what he did himself . . . ., or they were caused not by "Mr. Stephens but by Mr. Hurst." He then proceeds to deal with the former alternative in the following words (2): "To "say that Mr. Weld-Blundell gave Mr. Stephens the opportunity

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(1) [1920] A. C. 956.

(2) [1920] A. C. 981, 982.

"of making him liable and that Mr. Stephens took it and did "so, is to my mind a mere quibble. The appellant's liability "did not depend on or spring from Mr. Stephens, unless a mere "occasion is identified in law with cause. The way in which "the appellant must naturally and necessarily state his case "seems to me to put this view in a nutshell. 'True it is,' he "says, 'that I libelled Messrs. Comins and Lowe to Mr. Stephens; "'but, if Mr. Stephens had not lost my letter, they would have "'known nothing about it, and I should have escaped the con-"'sequences of my own wrongdoing.' My Lords, what is this "but saying in plainer language: 'My own act was the causa "'causans of the judgment against me, and Mr. Stephens's "'omission to be careful was the causa sine qua non.' From "the moment when the libel was published the appellant was "under legal liability, and the effect of the action was merely "to ascertain its amount and to compel the appellant to "discharge it. If he had been in possession of lost property, "belonging to Mr. Comins, and the letter had betrayed to the "owner the secret of its whereabouts; if he had encroached on "Mr. Lowe's land and the letter had apprised that gentleman "of the fact, just before a title accrued by lapse of time; if he "had owed a debt to them and the letter had recalled it to "their attention, I can hardly suppose that the several "judgments recovered could be alleged to be caused by the "respondent, even though it was by his fault that Messrs. "Comins and Lowe got at the letter. As Bankes L.J. says: "'The damages and costs in question are payable by reason of "'the plaintiff's own wrongdoing and were legally recoverable "'from him independently of the defendant's breach of his "'obligation.'" Lord Wrenbury, after stating the appellant's contention, says (1) that there is more than one answer to it. The first answer which he gives is the same as that given by Lord Sumner in the passage last quoted. He says: "The "relations between Weld-Blundell and Stephens were such that "the latter no doubt owed a duty to the former, and in that duty "he was negligent. Weld-Blundell's liability to pay money to "Lowe and Comins, however, arose not from that negligence,

(1) [1920] A. C. 998.

"but from his own wrongful act in indulging in malicious libel. "And the amount he had to pay was measured by his own "wrongful act. It bore no pecuniary relation to Stephens's "wrongful act. Stephens's act was not the cause (whether with "or without the word 'effective') of his having to pay, but was "an act without which possibly he would never have been called "upon to pay. It was not causa causans but at most causa sine "qua non. In discharging his liability to pay damages for "malicious libel, Weld-Blundell suffered no damage at all. A "man is not damnified by being compelled to satisfy his legal "obligation. In *Neville* v. *London 'Express' Newspaper* (1) the "House were unanimous upon this proposition." Lord Wrenbury then proceeded to give a further reason based on a passage from the judgment of Kennedy J. in *Burrows* v. *Rhodes*. (2) That passage, as I understand it, is not dealing with the question of causation of damage, but with a special substantive rule of law which prescribes that even if the damages are caused by the act complained of, they cannot be recovered if they are equivalent to an indemnity for the consequences to the plaintiff of an act, whether criminal or tortious, which manifestly or to his knowledge was unlawful. I cannot read this reference to the judgment of Kennedy J. as in any way qualifying what Lord Wrenbury had said in the passage which I have quoted.

The opinion of Lord Dunedin proceeds, I think, on different lines to those of Lord Sumner and Lord Wrenbury. Lord Finlay had declined to accept the view that the case was governed by the principle applied in *Neville's* case. (1) Lord Sumner, while disposed to think that that principle was in point, forbore from expressing any concluded opinion to that effect in deference to Lord Finlay. Lord Wrenbury treated *Neville's* case (1) as establishing the general proposition which he enunciated. Lord Dunedin, referring to *Burrows'* case (2) and *Neville's* case (1), said (3): "But though the cases are "distinguishable upon the ground that the application of the "principle is to be found in different circumstances, yet in my

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(1) [1919] A. C. 368.
(2) [1899] 1 Q. B. 816, 828.
(3) [1920] A. C. 956, 976.

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"opinion the underlying principle is the same." There is an element of difficulty in this statement, since if the opinion which I have ventured to express is correct, the two cases referred to deal with two different matters, *Neville's* case (1) with the causation of damage, and *Burrows'* case (2) with a special substantive rule of law. Lord Dunedin then takes as one example of " the underlying proposition that no man can "claim damages when the root of the damage which he claims "is his own wrong," the case of contribution between wrongdoers. He then deals with *Neville's* case. (1) He appears to treat the damage which the plaintiff in that case had suffered as the natural and probable consequences of the maintenance of which the defendants had been guilty, and to hold that the reason why the plaintiff was unable to recover was the rule of law that " a man cannot recover damages because he has had "to make reparation for a wrongful act committed by himself." If I have correctly understood Lord Dunedin's opinion, it is based on a different ground to those of Lord Sumner and Lord Wrenbury. But in so far as it is necessary or proper for me to express my own preference between these different views, I accept the reasons given by Lord Sumner and Lord Wrenbury, which, if I may respectfully say so, appear to me to be more consonant with the decision in *Neville's* case (1) than the views of that case expressed by Lord Dunedin.

The result, in my opinion, is that the plaintiff in the present case is not in any event entitled to more than nominal damages. This conclusion is not, in my judgment, affected by the fact that both parties contemplated that if the promise was broken the plaintiff would, in all probability, be expelled from his union.

Appeal dismissed.
Cross-appeal allowed.

Solicitors for plaintiff: *Kays & Jones.*
Solicitors for defendants: *Lewis & Lewis.*

J. R.

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(1) [1919] A. C. 368.

(2) [1899] 1 Q. B. 816.

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Gaming—Bets—Claim for repayment of bets overpaid—Money had and received—Money paid through mistake of fact—Necessity for the taking of account—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 18—*Gaming Act*, 1892 (55 *Vict. c.* 9), *s.* 1.

The defendant was in the habit of making bets with the plaintiff, a bookmaker. The plaintiff claimed that through a mistake on the part of his clerk in making out the account the defendant was overpaid to the extent of 24*l.* 2*s.* 1*d.* and he sued the defendant to recover that amount. The defendant counterclaimed for a balance of 9*l.* 13*s.* 4*d.* alleged to be due to him. The county court judge found that 24*l.* 2*s.* 1*d.* had been overpaid under a mistake of fact and he entered judgment for the plaintiff. On appeal:—

Held, first, that the dispute between the parties was a dispute between a backer and a bookmaker as to the nature of the account between them; and that in order to ascertain whether or not an overpayment had been made it would be necessary for the Court to examine the state of the account between the parties. But the Court was not entitled to do that by reason of the Gaming Act, 1845, as by merely taking the account the Court would be recognizing wagering transactions as producing legal obligations. The plaintiff's claim therefore failed.

Secondly, the plaintiff's claim was for money had and received based upon a mistake of fact, but in order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fundamental fact. In making the payment the plaintiff was under a mistake as to the nature of the transaction; he thought that a wagering debt was due from himself to the defendant, whereas, on the facts as found by the county court judge, it was not. But if the supposed fact had been true the plaintiff would have been under no liability to make the payment, which was only in law a voluntary payment, and on this ground also the plaintiff's claim failed.

Principles laid down by Bramwell B. in *Aiken* v. *Short* (1856) 1 H. & N. 210, 215 discussed and applied.

Dictum of Channell J. in *Gasson* v. *Cole* (1910) 26 Times L. R. 468, 469, dissented from.

APPEAL from a decision of Judge L. C. Thomas sitting at the Abergavenny County Court.

The plaintiff was a bookmaker and he claimed to recover from the defendant, a licensed victualler, who had been in the habit of making bets with him, a sum of 24*l.* 2*s.* 1*d.*, being the amount of an alleged overpayment made by the plaintiff to the defendant in settling bets.

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The claim arose in the following circumstances: According to the plaintiff's case the defendant won from the plaintiff on balance a sum of 24*l.* 2*s.* 1*d.* in respect of bets made by the defendant with the plaintiff on June 4, 1936, and this amount was credited to him for that day's transactions. On June 5 the defendant made further bets with the plaintiff, as the result of which, according to the plaintiff's case, the defendant lost 23*l.* and won 21*l.* 13*s.* 9*d.*, leaving him a loser on balance of 1*l.* 6*s.* 3*d.* By a mistake on the part of the plaintiff's clerk in making out the account, the sum of 24*l.* 2*s.* 1*d.* was carried forward into the account for June 5, with the result that this account showed the defendant to be a winner to the extent of 22*l.* 15*s.* 10*d.* instead of showing him (as it ought to have done) to be a loser to the extent of 1*l.* 6*s.* 3*d.* This sum of 22*l.* 15*s.* 10*d.* together with the sum of 24*l.* 2*s.* 1*d.*, making together 46*l.* 17*s.* 11*d.*, was paid to the defendant by the plaintiff's clerk, with the result that upon the account put forward by the plaintiff the defendant had been overpaid to the extent of 24*l.* 2*s.* 1*d.*, the sum which the plaintiff sought to recover in this action.

The defendant made a counterclaim in which he alleged that he had made other bets with the plaintiff not shown in the plaintiff's accounts, as a result of which the plaintiff owed him 9*l.* 13*s.* 4*d.* after taking into account the sum of 46*l.* 17*s.* 11*d.* paid to him by the plaintiff.

The county court judge found as a fact that the defendant had been overpaid to the extent of 24*l.* 2*s.* 1*d.*, and that the overpayment was made under a mistake of fact—namely, the mistake of the plaintiff's clerk in not noticing that the 24*l.* 2*s.* 1*d.* due on the first day's transactions had been credited twice, and he gave judgment for the plaintiff for that amount. He found as a fact that the defendant did not make the additional bets alleged in the counterclaim, with the result that the counterclaim failed.

The defendant appealed.

R. G. Micklethwait for the defendant, appellant. The county court judge was wrong in giving judgment for the

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plaintiff on his claim, and in dismissing the defendant's counterclaim. There was no evidence to support the county court judge's finding of fact that the defendant had been overpaid by the plaintiff. On the facts there was a balance owing to the defendant of 9*l.* 13*s.* 4*d.*; and, therefore, the defendant is entitled to judgment on the plaintiff's claim, and also to judgment on the counterclaim for that balance.

Even assuming, however, that the county court judge's findings of fact are right, the plaintiff is not entitled to recover on his claim.

First, the plaintiff is not entitled to recover the sum claimed on the ground that it was paid under a mistake of fact. The action to recover money had and received by a defendant on the ground that it was paid under a mistake of fact is not now so wide in its scope as it formerly was. The view previously taken of this form of action appears from the case of *Sadler* v. *Evans* (1), where Lord Mansfield observed: "It is a liberal "action, founded upon large principles of equity, where the "defendant cannot conscientiously hold the money. The "defence is any equity that will rebut the action." It would seem to have been on that principle that it was held in *Kelly* v. *Solari* (2) that money paid under a bona fide forgetfulness of facts which disentitled the defendant to receive it might be recovered back. Parke B. there said (3) that "where money "is paid to another under the influence of a mistake, that is, "upon the supposition that a specific fact is true, which "would entitle the other to the money, but which fact is "untrue, and the money would not have been paid if it had "been known to the payer that the fact was untrue, an action "will lie to recover it back, and it is against conscience to "retain it." That view has not, however, been approved in more recent cases. Thus in *Sinclair* v. *Brougham* (4), where Lord Sumner observed: "There is now no ground left for "suggesting as a recognizable 'equity' the right to recover "money in personam merely because it would be the right

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(1) (1766) 4 Burr. 1984, 1986.
(2) (1841) 9 M. & W. 54.
(3) 9 M. & W. 58.
(4) [1914] A. C. 398, 456.

" and fair thing that it should be refunded to the payer "; and it has been severely criticized in *Holt* v. *Markham* (1), where it was held that in the circumstances of that case the plaintiffs could not recover from the defendant the money which they claimed as having been paid under a mistake of fact. Scrutton L.J. there observed (2) that ever since *Sadler* v. *Evans* (3) was decided " the whole history of this particular " form of action has been what I may call a history of well- " meaning sloppiness of thought." In *Aiken* v. *Short* (4) money paid by bankers under a mistake of fact was held to be irrecoverable in the circumstances of that case. Bramwell B. there laid it down (5) that: " In order to entitle a person to " recover back money paid under a mistake of fact, the " mistake must be as to a fact which, if true, would make the " person paying liable to pay the money; not where, if true, " it would merely make it desirable that he should pay the " money." In the present case the plaintiff knew that the payment which he made was in respect of bets, and that he was under no legal liability to make it. In *In re The Bodega Co.* (6), where it was held that a company was entitled to recover back fees paid to a person under the mistake of fact that he was a director of the company, Farwell J., referring to that observation of Bramwell B., said (7): " That, I " apprehend, means this. If you are claiming to have money " repaid on the ground of mistake, you must show the mistake " is one which led you to suppose you were legally liable to " pay." That rule was also recognized in *Maskell* v. *Horner* (8), where it was held that the plaintiff could not recover the amount of tolls which had been unlawfully demanded from him as money paid under a mistake of fact, inasmuch as he had paid the tolls, not because he was under the mistaken belief that he was legally liable, but because he did not wish to be sued for them. In *In re Thellusson* (9), where a creditor lent money to a debtor without either of them knowing that a receiving order had been made against the debtor, it was held by the Court of Appeal that the creditor could recover the money from the official receiver because it would not be right, in view of his official position, that the latter should keep it; but it would seem that in that case it was only because of the official position of the person receiving the money that it was held to be recoverable. In *Jones (R. E.), Ld.* v. *Waring & Gillow, Ld.* (1), it was held by the Court of Appeal that the plaintiffs, who had paid money to the defendants under a mistaken view of the facts which had been presented to them by a third party, could not recover it back, and although that decision was reversed in the House of Lords (2) it was only by a majority of three Lords as against two, the majority apparently relying upon the dictum of Parke B. in *Kelly* v. *Solari.* (3) In *Home and Colonial Insurance Co.* v. *London Guarantee and Accident Co.* (4), where the liquidator of an insurance company had paid claims under contracts in respect of which stamped policies had not been issued (the liquidator being ignorant both of the fact that no stamped policies had been issued and of the law that required such policies), it was held that the money so paid could not be recovered back as money paid under a mistake. In *Steam Saw Mills Co.* v. *Baring Brothers & Co.* (5), where under a contract the plaintiffs paid money to the defendants as agents for a foreign Government in ignorance of the fact that since the contract had been entered into there had been a change of Government in that country, it was held that they could not recover the money as having been paid under a mistake of fact, since the fact of which they were ignorant was not one which, if they had known it, would necessarily have discharged them from liability. In *Kerrison* v. *Glyn, Mills, Currie & Co.* (6), where it was held that money paid to a banker under a mistake of fact could be recovered, the decision of the House of Lords would appear to have been based on the conclusion in law reached by the trial judge on the facts found by him. The cases show that in

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(1) [1923] 1 K. B. 504.
(2) Ibid. 513.
(3) 4 Burr. 1984.
(4) (1856) 1 H. & N. 210; 25 L. J. (Ex.) 321.
(5) 1 H. & N. 215.
(6) [1904] 1 Ch. 276.
(7) Ibid. 286.
(8) [1915] 3 K. B. 106.
(9) [1919] 2 K. B. 735.

(1) [1925] 2 K. B. 612.
(2) [1926] A. C. 670.
(3) 9 M. & W. 54, 58.
(4) (1928) 45 Times L. R. 134.
(5) [1922] 1 Ch. 244.
(6) (1911) 17 Com. Cas. 41.

order that money paid may be recovered back on the ground that it was paid under a mistake of fact, the money must have been paid on the supposition that it was legally payable and not merely on the supposition that it was morally payable. In the present case the plaintiff cannot have supposed that the sum which he paid and which he seeks to recover was legally payable. The plaintiff paid the whole sum of 46*l.* 17*s.* 11*d.* to the defendant on the supposition that it was payable in respect of gaming debts and he at that time intended that the whole sum should be applied in payment of such debts. In order to show that in paying that sum to the defendant he was making the mistake of fact of overpaying him by 24*l.* 2*s.* 1*d.* he sought to prove that the latter sum was payable by the defendant to the plaintiff in respect of gaming debts. Thus in order to arrive at the amount of his claim the plaintiff had to rely entirely on gaming debts, and as gaming contracts are void in law, the sum which the plaintiff claims was paid not under a mistake as to his legal but only as to his moral liability, and therefore he cannot recover it as having been paid under a mistake of fact. In *Gasson* v. *Cole* (1) Channell J., in reference to money paid under a mistake of fact in respect of a betting transaction, no doubt said that "if it was a clear mistake of fact, he "thought that the person would be entitled to recover the "money back"; but it is submitted that that dictum is incorrect in law and that the county court judge should not have relied upon it.

Secondly, the plaintiff is prevented from recovering the sum which he claims by the Gaming Acts, 1845 and 1892. That sum is a balance which the plaintiff alleges is due to him on an account between him and the defendant. In order to prove that that balance is due, the plaintiff must prove the debts on both sides of the account. But these debts were all due on gaming contracts which are null and void under the Acts, and the alleged balance therefore is also null and void. In *Butts* v. *Ellred* (2) it was held that an agent was not entitled to recover the balance of a betting account by reason

(1) (1910) 26 Times L. R. 468, 469.

(2) (1896) 12 Times L. R. 624.

of the Gaming Act, 1892. The last point decided in *Shoolbred* v. *Roberts* (1) would seem, however, to be somewhat opposed to this contention of the defendant.

It is true that the defendant, though he relies on the Gaming Acts as a statutory defence, did not expressly plead these Acts in his defence pursuant to the County Court Rules, 1903 to 1934, Order x., r. 18, sub-r. 1; but it was not necessary for him to do so, because sub-r. 2 of that rule provides that "nothing in this rule shall entitle a plaintiff to maintain an "action contrary to the provisions of the Gaming Acts, "1845 or 1892, by reason of those Acts not having been "pleaded as a defence." Moreover, it appears from the authorities that even though these Acts have not been pleaded, the judge must himself take judicial notice of them and give effect to them: see *Luckett* v. *Wood.* (2)

Carey Evans for the plaintiff, respondent. The county court judge rightly held that the plaintiff had been overpaid to the extent of 24*l.* 2*s.* 1*d.*; that that overpayment was made under a mistake of fact and might be recovered back; and that the defendant did not make the additional bets mentioned in the counterclaim; and he accordingly rightly gave judgment for the plaintiff on the claim and dismissed the defendant's counterclaim.

The plaintiff is entitled to recover the sum claimed from the defendant as money paid by him to the latter under a mistake of fact. That sum was paid through a mere error in calculation by virtue of which the defendant received from the plaintiff a sum that had already been paid to him. It plainly appears on the face of the account between the parties that the defendant was being overpaid by the amount of the plaintiff's claim.

The sum in question was paid by the plaintiff in the mistaken belief that it was legally due and not merely in the belief that it was only morally due. It was not in any sense a gaming debt. The account by reference to which it appears that this sum was an excess payment was an ordinary money account which did not show any bets. It is true that the sum

(1) [1899] 2 Q. B. 560.

(2) (1908) 24 Times L. R. 617.

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has been referred to as a balance of the account between the parties, but it was proved in the county court that it was a sum which was not included in that account.

This was a payment voluntarily made by the plaintiff to the defendant in ignorance of the fact that the sum had already been paid. It has never been decided that a voluntary payment made by mistake in respect of a debt already paid cannot be recovered back.

The general principle applicable to this case is that which was laid down by Lord Mansfield in *Moses* v. *Macferlan* (1) in these words: "This kind of equitable action, to recover "back money, which ought not in justice to be kept, is very "beneficial, and therefore much encouraged. It lies only for "money which, ex aequo et bono, the defendant ought to refund: "it does not lie for money paid by the plaintiff, which is claimed "of him as payable in point of honor and honesty, although "it could not have been recovered from him by any course "of law; as in payment of a debt barred by the Statute of "Limitations, or contracted during his infancy, or to the "extent of principal and legal interest upon an usurious "contract, or, for money fairly lost at play: because in all "these cases, the defendant may retain it with a safe conscience, "though by positive law he was barred from recovering. "But it lies for money paid by mistake; or upon a considera-"tion which happens to fail; or for money got through "imposition. . . . ."

Aiken v. *Short* (2), where Bramwell B. held that in order to entitle a person to recover money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make him liable to pay and not merely make it desirable that he should pay, and the subsequent cases, such as *Maskell* v. *Horner* (3), which proceeded on that principle, have no bearing on the present case. In this case, by a mere arithmetical error the plaintiff paid to the defendant a sum to which the latter had no claim. Further, at the time when the plaintiff made the payment he believed that he was paying

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(1) (1760) 2 Burr. 1005, 1012.
(2) 1 H. & N. 210, 215.
(3) [1915] 3 K. B. 106.

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a debt which was justly due from him, and it cannot be supposed that in doing that he was getting any benefit by making the payment. Moreover, at the time when the money was paid an account was given to the defendant which made it plain that the money was being paid twice over. *Aiken* v. *Short* (1) is distinguishable from the present case, and the dictum of Bramwell B. is not binding upon this Court and ought not to be followed. Bramwell B., according to the report in Hurlstone & Norman (2), laid down a general rule which is often referred to. But according to the fuller report of the case in the Law Journal, after laying down the general rule, he goes on to say (3): " I do not know whether " that is a sufficiently comprehensive principle, but it is one " which has existed throughout in my mind." He there expressed a doubt whether the principle that he was laying down would comprehend all cases. Bramwell B. then proceeded to give his reasons for laying down that general rule. He had in mind a case where persons thought fit for their own benefit to pay money to the defendant. When a payment is made not for the benefit of the payer, but in order to avoid a detriment which would occur to the payer if the facts were as he supposed them to be, the payment would fall within the dictum of Bramwell B., provided there was a threat which was made in order to compel the payer to pay. In the present case there was no threat; the payment was a purely voluntary payment and therefore it does not come within the dictum of Bramwell B. in *Aiken* v. *Short.* (4) In *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (5), Lord Sumner said: " In the case of payments of money, however, the " notion is common that, if some one pays me money when " he need not do so, it is my windfall, for I am not bound to " keep his accounts for him. This is where the fallacy comes " in. I may not be bound to know the payer's accounts but " I ought to know my own." The receiver of money which is not due cannot retain the money, when he probably knew and certainly ought to have known that it was not due. In *Sinclair* v. *Brougham* (1) Lord Dunedin contrasted the difference between the case of a chattel delivered by mistake and the case of payment of money made under the mistaken impression that a debt was due when in truth there was no debt due. The same idea was developed in *Norwich Union Fire Insurance Society* v. *Wm. H. Price, Ld.* (2), where Lord Wright said (3): "The facts which were misconceived were "those which were essential to liability and were of such a "nature that on well-established principles any agreement "concluded under such a mistake was void in law, so that any "payment made under such mistake was recoverable. The "mistake, being of the character that it was, prevented there "being that intention which the common law regards as "essential to the making of an agreement or the transfer of "money or property." It is clear from the other judgments in *Aiken* v. *Short* (4) that that case was decided in the way it was decided not because it was a voluntary payment but because the debt was due. That case is no authority in a case like the present case where the person who receives the money knows that he is not entitled to receive it and that the person making the payment has no intention of making him a present. Hamilton L.J. said in *Baylis* v. *Bishop of London* (5): "I "think that in citing dicta so largely expressed it is well to "remember a saying of Sir James Mansfield in *Brisbane* v. "*Dacres* (6): 'It certainly is very hard upon a judge, if a rule "'which he generally lays down is to be taken up, and carried "'to its full extent. This is sometimes done by counsel, who "'have nothing else to rely on; but great caution ought to "'be used by the Court in extending such maxims to cases "'which the judge who uttered them never had in "'contemplation.'" When Bramwell B. expressed the dictum in *Aiken* v. *Short* (7), which is relied upon by the appellant, he did not have in his mind such a case as the present one. That dictum ought not to be followed in the present case. It was

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(1) 1 H. & N. 210; 25 L. J. (Ex.) 321.

(2) 1 H. & N. 215.

(3) 25 L. J. (Ex.) 324.

(4) 1 H. & N. 215; 25 L. J. (Ex.) 324.

(5) [1926] A. C. 670, 696.

(1) [1914] A. C. 398, 431.
(2) [1934] A. C. 455.
(3) Ibid. 461.
(4) 1 H. & N. 210.
(5) [1913] 1 Ch. 127, 138.
(6) (1813) 5 Taunt. 143, 162.
(7) 1 H. & N. 215.

entirely obiter and not necessary for the decision of that case, and was not concurred in by the other judges in that case. If pressed to its full extent it would result in a manifest injustice. It is not supported by the subsequent decisions. It has been accepted as a statement of the law without any discussion as to whether or not it is correct : see *In re The Bodega Co.* (1) ; *Maskell* v. *Horner.* (2) The decision of the House of Lords in *Kerrison* v. *Glyn, Mills, Currie & Co.* (3) could not be supported if the dictum of Bramwell B. applied. The dictum of Channell J. in *Gasson* v. *Cole* (4) that a person who paid money under a mistake of fact in a betting transaction was entitled to recover the money back is directly in point in the present case and ought to be followed.

Micklethwait in reply. The proposition enunciated by Bramwell B. is set out in the text of Kerr on Fraud and Mistake, 6th ed., at p. 636, and *Aiken* v. *Short* (5) and *In re Bodega Co., Ld.* (1) are cited as authorities for the proposition. The dictum of Bramwell B. was applied and followed in *Leedon* v. *Skinner.* (6) It is also stated in Kerr on Fraud and Mistake, at p. 215, that " voluntary gifts and subscriptions to charities fall " within the same principle, and cannot be set aside or recovered " except on the ground of fraud or mistake induced by the donee." The defendant did not tell the plaintiff that so much money was owing to him and so induce the plaintiff to act to his detriment. It is true that this was not a payment made under a legal liability inasmuch as it was paid in respect of a gaming debt, nevertheless it was not a voluntary payment as it was not made under an illegal contract ; it was made to avoid a detriment which might have happened if the bookmaker took a certain course. There is an implied recognition by the Privy Council in *Norwich Union Fire Insurance Society* v. *Wm. H. Price, Ld.* (7), that the rule is as stated by Bramwell B. in *Aiken* v. *Short.* (5) The consideration here was payment of a gaming account. The appeal ought to succeed, because the county court judge has taken an account of gambling transactions contrary to the provisions of the Gaming Act, 1845.

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(1) [1904] 1 Ch. 276.
(2) [1915] 3 K. B. 106.
(3) 17 Com. Cas. 41.
(4) 26 Times L. R. 468, 469.
(5) 1 H. & N. 215.
(6) [1923] Vict. L. R. 401.
(7) [1934] A. C. 455.

Cur. adv. vult.

1937. May 11. The following judgments were read:—

SIR WILFRID GREENE M.R. This appeal raises some novel points. The plaintiff is a bookmaker and he claims to recover from the defendant, a licensed victualler who had been in the habit of making bets with him, a sum of 24*l.* 2*s.* 1*d.*, being the amount of an alleged overpayment made by the plaintiff to the defendant in settling bets.

The claim arises in the following circumstances. [His Lordship stated the facts set out above and continued:] The learned county court judge found as a fact that the defendant had been overpaid to the extent of 24*l.* 2*s.* 1*d.* and that the overpayment was made under a mistake of fact—namely, the mistake of the plaintiff's clerk in not noticing that the 24*l.* 2*s.* 1*d.* due on the first day's transactions had been credited twice, and he gave judgment for the plaintiff for this amount. He entertained doubts as to the maintainability of the counterclaim, but he found as a fact that the defendant did not make the additional bets in question, with the result that the counterclaim in any event failed. The decision of the learned county court judge on the counterclaim being, as it was, a pure decision on fact, was not and could not have been challenged before us, and the only question which falls for decision is whether or not the learned county court judge was right in holding that the plaintiff is entitled to recover the 24*l.* 2*s.* 1*d.* which upon the account must be taken to have been an unintentional overpayment. But although the counterclaim was dismissed, the fact that it was made—and there is nothing to suggest that it was not made bona fide—does, I think, throw a light upon the essential character of the claim. In substance the dispute between the parties is a dispute between a backer and a bookmaker as to the state of the account between them. The fact that the defendant's cross-claim is raised by way of counterclaim and not by way

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of set-off does not, in my view, affect the substantial point that in order to ascertain whether or not an overpayment had been made which the plaintiff was entitled to recover it was necessary for the Court to examine the state of the account between the parties. Now this, in my opinion, is a thing which the Court is not entitled to do, since by merely taking the account the Court would necessarily be recognizing wagering transactions as producing legal obligations and therefore doing the very thing which the Gaming Act, 1845, does not permit to be done. (In truth, a claim such as the present to recover an overpayment in respect of wagering transactions must, in my view, inevitably be founded upon an account between the parties.) It would plainly not be possible for a bookmaker to bring an action for an account of the wagering transactions between himself and a client and repayment of any amount found upon the taking of the account to have been overpaid. The bookmaker, in my opinion, cannot put himself in a better position if instead of asking for relief of that character he asks for repayment of a specified sum alleged by him to have been overpaid. In each case the fact and the amount of overpayment can only be ascertained through what is in reality (though in the latter case not necessarily in form) the taking of an account. The contrary view would produce a remarkable result. If one party to wagering transactions alleges that he has overpaid the other party and claims the amount overpaid as money had and received to his use, it would be open to the defendant, on principle and apart from the Gaming Acts, to deny the overpayment and adduce evidence of further wagering transactions as the result of which, at the date of the alleged overpayment, he was on balance a winner by an amount greater than that claimed. But having regard to the Gaming Acts the Court, in my opinion, could not listen to such a defence. The claim for money had and received is a claim to recover money which in the eye of the law the defendant is liable to repay to the plaintiff. Such a claim, if otherwise maintainable, could not be defeated by setting up as a defence to it a cross-claim based upon no recognizable legal obligation. In other words, the Court could not examine the state of

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account between the parties; and as the plaintiff's claim could not be dealt with in the absence of an examination of the whole account it must of necessity fall. As I have already pointed out, this is the substance of the position in the present case and the appeal succeeds upon this ground.

But there is another ground upon which the action ought in my opinion to have been dismissed, and as we have had the benefit of a full argument upon it I think it right to express my views upon it. The plaintiff's claim is for money had and received, and it is based upon what the learned county court judge found to be a mistake of fact. The question which arises is, Can such a claim succeed in the circumstances of this case? In my opinion it cannot. The nature of the claim to recover money paid under a mistake, and the limits within which it can be made, have been the subject of much controversy and the difficulties involved in providing a comprehensive solution to these problems have not as yet been overcome. Two propositions can, I think, be put forward with certainty. The first is that the claim cannot now be said to be based on some rule of aequum et bonum by virtue of which a man must not be allowed to enrich himself unjustly at the expense of another. Lord Mansfield's views upon those matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim. The second proposition is that the claim is based upon an imputed promise to repay. "All these causes of "action are common species of the genus assumpsit," said Lord Sumner in *Sinclair* v. *Brougham*. (1) "All now rest, "and long have rested, upon a notional or imputed promise to "repay."

So much is I think clear. But the question still remains, In what circumstances will the law impute a promise to repay where the payment was made under a mistake? That it will not do so in all circumstances is manifest. In general, no such promise can be imputed where the payment is made under a mistake of law. Nor can a promise to repay be imputed which, to quote again Lord Sumner's words in *Sinclair* v. *Brougham* (1), "if made de facto" the law "would inexorably avoid."

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(1) [1914] A. C. 398, 452.

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In *Sinclair* v. *Brougham* (1) the promise if made de facto would have been ultra vires the society concerned; it could not therefore be imputed, and the claim so far as it was for money had and received necessarily failed for that reason.

In the light of these observations it is convenient at this point to examine the present claim in relation to the provisions of the Gaming Act, 1892. Sect. 1 of that Act provides that "any promise, express or implied, to pay any person any sum "of money paid by him under or in respect of any contract or "agreement rendered null and void by" the Gaming Act, 1845 " . . . . shall be null and void, and no action shall be "brought or maintained to recover any such sum of money." It is said that the sum overpaid was within the meaning of this section a sum paid by the plaintiff in respect of a wagering transaction and that the promise to repay which it is desired to impute is an implied promise to pay the plaintiff that sum. I cannot accept this argument.

Promise

In the first place, the section is concerned with promises to "pay"—this appears to me to contemplate an initial payment to be made in the future by the promisor, not a repayment under a promise imputed by law of money already paid to the promisor to which he had no claim. This construction is in accordance with the recognized mischief which the Act was designed to remedy. In the next place the payment by the promisee in relation to which the promise to pay must be given in order that it may be avoided by the section, is a payment of money paid by the promisee "under or in respect of" a gaming contract. In my opinion these words are not apt to include the case where the payment, although connected historically with a gaming contract, is in fact an overpayment made in the mistaken belief that it was due under such a contract.

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I now return to the point at which I left the main question. A great part of the argument was concentrated on the words used by Bramwell B. in *Aiken* v. *Short.* (2) He said: "In order "to entitle a person to recover back money paid under a "mistake of fact, the mistake must be as to a fact, which, if

(1) [1914] A. C. 398. (2) 1 H. & N. 210, 215.

"true, would make the person paying liable to pay the money; "not where, if true, it would merely make it desirable that he "should pay the money." In that case the plaintiff bank had acquired, as it thought, certain property which was subject to an equitable charge and had agreed with its supposed grantor (who with others was personally liable for the amount secured by the charge) to pay it off. This it did. It was afterwards discovered that the grantor had no title to the property and the bank sued the defendant to whom the charge had belonged to recover the money which it had paid. Now it is to be observed that in that case the bank, although contractually bound to its supposed grantor to pay off the charge, was under no such liability towards the holder of the charge herself; and although the payment was thought by the bank to be beneficial to itself in that it was, as it thought, discharging a contractual obligation and freeing its property from an incumbrance, yet it was not under any mistaken belief that the payee could demand payment. In other words, the payment was in any event, whether or not the supposed facts were true, a voluntary payment as between payer and payee.

The passage which I have quoted from Bramwell B.'s judgment has been referred to with approval by several learned judges, but always I think by way of dictum. References of this kind were made by Farwell J. in *In re The Bodega Co., Ld.* (1); by Rowlatt J. in *Maskell* v. *Horner* (2); and by Pollock M.R. in *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (3) But before considering further this statement of the law it is convenient to examine some more modern decisions in which the character of the mistake required to found the action has been considered. In *Sinclair* v. *Brougham* (4) Lord Dunedin compares the cases of delivery of a chattel and delivery of money with reference to the "intention" of the deliveror. In *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (5), Lord Sumner elaborates this comparison. He points out that if a tradesman delivers goods to the wrong person, the absence of any real intention prevents the property from passing. Cases where money paid under a mistake of fact is recoverable he founds upon lack of real intention on the part of the payer, although he appears to say or to imply that in order to prevent there being any real intention the facts must be such that the payee knows, or must be deemed to know, of the mistake, a limitation which I must confess I find it a little difficult to appreciate if it is intended to be of general application. The last case in which the matter was considered was *Norwich Union Fire Insurance Society* v. *William H. Price, Ld.* (1), decided by the Privy Council, and I will quote two passages from the judgment of the Judicial Committee in that case, which was delivered by Lord Wright (2): "The facts which were misconceived were those which were "essential to liability and were of such a nature that on "well-established principles any agreement concluded under "such mistake was void in law, so that any payment made "under such mistake was recoverable. The mistake, being of "the character that it was, prevented there being that intention which the common law regards as essential to the making "of an agreement or the transfer of money or property." Later on he said (3): "It is true that in general the test of "intention in the formation of contracts and the transfer of "property is objective; that is, intention is to be ascertained "from what the parties said or did. But proof of mistake "affirmatively excludes intention. It is, however, essential "that the mistake relied on should be of such a nature that it "can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being "fundamental or basic."

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(1) [1904] 1 Ch. 276, 286.
(2) [1915] 3 K. B. 106, 109.
(3) [1925] 2 K. B. 612, 631.
(4) [1914] A. C. 431.
(5) [1926] A. C. 670, 696.

The view of the law developed in the judgments to which I have just referred affords an additional guide. It is, I think, instructive to consider the words of Bramwell B. referred to above in the light of these authorities. In the first case which he mentions, namely, that where the supposed fact if true would have made the person paying liable to pay the money, the mistake is a mistake as to the nature of the transaction.

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(1) [1934] A. C. 455.
(2) Ibid. 461.
(3) Ibid. 463.

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The payer thinks that he is discharging a legal obligation whereas in truth and in fact he is making a purely voluntary payment. Such a mistake is to my mind unquestionably fundamental or basic and may be compared, at least by way of analogy, with the class of case in which mistake as to the nature of the transaction negatives intention in the case of contract. But the second case which he mentions, namely, that where the supposed fact would, if true, merely make the payment desirable from the point of view of the payer, is very different. In that case the payment is intended to be a voluntary one and a voluntary payment it is whether the supposed fact be true or not. It appears to me that a person who intends to make a voluntary payment and thinks that he is making one kind of voluntary payment whereas upon the true facts he is making another kind of voluntary payment, does not make the payment under a mistake of fact which can be described as fundamental or basic. The essential quality of the payment, namely its voluntary character, is the same in each case. If a father, believing that his son has suffered a financial loss, gives him a sum of money, he surely could not claim repayment if he afterwards discovered that no such loss had occurred ; and (to take the analogous case of contract) if instead of giving him money, he entered into a contract with his son, he surely could not claim that the contract was void. To hold the contrary would almost amount to saying that motive and not mistake was the decisive matter.

I come therefore to the conclusion that the observations of Bramwell B., supported as they are by much weight of judicial opinion, are, so far as regards the class of mistake with which he was dealing, in agreement with the more recent authorities, and I propose to follow them. It was said on behalf of the respondent that these observations do not correctly state the law. I do not agree, although I am disposed to think that they cannot be taken as an exhaustive statement of the law but must be confined to cases where the only mistake is as to the nature of the transaction. For example, if A makes a voluntary payment of money to B under the mistaken belief that he is C, it may well be that A can recover it. Bramwell B. was not dealing with a case such as that, since he was assuming that there was no such error in persona. If we are to be guided by the analogous case of contract, where mistake as to the person contracted with negatives the intention to contract, the mistake in the case which I have mentioned ought to be held to negative the intention to pay the money and the money should be recoverable.

But it is not necessary to pursue this matter further. It is sufficient to say that in my opinion the present case falls within principles laid down both by Bramwell B. and in the more recent authorities. In making the payment the respondent was, it is true, under a mistake as to the nature of the transaction. He thought that a wagering debt was due from himself to the appellant, whereas in fact it was not. But if the supposed fact had been true, the respondent would have been under no liability to make the payment which therefore was intended to be a voluntary payment. Upon the true facts the payment was still a voluntary payment; and there is in my opinion no such fundamental or basic distinction between the one voluntary payment and the other that the law can for present purposes differentiate between them and say that there was no intention to make the one because the intention was to make the other.

For these reasons I am of opinion that the appeal must be allowed with costs here and below. I should add that it follows from what I have said that I am unable to agree with the dictum of Channell J. in *Gasson* v. *Cole* (1), upon which reliance was placed by the respondent.

SCOTT L.J. The argument for the appellant fell into two broad divisions. The first was that it was impossible for the judge to give judgment for the amount claimed without in effect enforcing claims for gaming debts and thus transgressing s. 18 of the Gaming Act, 1845.

I think the appellant was right on this first ground.

The second was that there was no such mistake of fact proved, or capable of being proved, as is necessary to found

(1) 26 Times L. R. 468, 469.

the old common law action for money had and received. This second submission was based mainly on a ground which I think insufficient by itself to entitle the appellant to our judgment; but there are in my opinion two other grounds for holding that this second submission also must succeed.

I will deal with the first submission first. The respondent is a bookmaker. The appellant is a publican who was a regular customer of the respondent for betting transactions. The nature of the mistake, which led to the alleged overpayment of 24*l.* 2*s.* 1*d.* upon which the action was brought, was proved in evidence to have been a clerical error by the respondent's clerk which led her to give the appellant credit for the sum of 24*l.* 2*s.* 1*d.* twice over; thus causing respondent to pay to the appellant 24*l.* 2*s.* 1*d.* too much. It happened in this way. That figure was the credit balance of wins by the appellant over his losses for June 4, 1936, and it was shown as a credit to the appellant at the foot of the first page of an account dated June 6, 1936, which was delivered by the respondent as bookmaker, to the appellant, as customer. The second page of the account was for the bets of June 5, but the credit balance of June 4 was carried forward from page 1, and shown on the top of page 2, and was therefore included in the final credit balance in favour of the defendant of 22*l.* 15*s.* 10*d.* shown at the bottom of page 2. The appellant called on June 6 to collect his winnings. The respondent's clerk did not notice the carry forward on page 2 of the 24*l.* 2*s.* 1*d.* from page 1, assumed that the appellant had on June 5 won 22*l.* 15*s.* 10*d.* on balance, whereas he had in fact on that day lost 1*l.* 6*s.* 3*d.* on balance of the day, and accordingly paid him 46*l.* 17*s.* 11*d.*, the total of the two credit balances. The appellant in evidence alleged that he had won other bets which left the respondent his debtor to the extent of 9*l.* 13*s.* 4*d.* even after payment of the 46*l.* 17*s.* 11*d.* The action was brought by the respondent for the 24*l.* 2*s.* 1*d.* overpaid on the clerical mistake. The appellant counterclaimed for the 9*l.* 13*s.* 4*d.*

In order to establish the above facts and thereby to prove his mistake, the appellant was compelled to put the whole account before the Court and invite the Court to ascertain what was the true balance figure of bets lost and won, on each of the two days. There was, of course, no legal obstacle to the Court taking cognizance of the fact that the respondent was voluntarily giving the appellant credit for the appellant's winnings and thus paying them in account; but to ask the Court to recognize the respondent's winnings from the appellant and to set them off against his losses was in effect to ask the Court to enforce those winnings against the appellant. It was impossible for the Court to verify either the fact or the amount of the respondent's alleged mistake without going through the above process and thus in effect enforcing the respondent's claims to set off his winnings against his losses.

In the same way it was impossible to ascertain whether the sum of *24l. 2s. 1d.*, which on the above facts appeared to have been an overpayment, was in truth what it appeared to be without investigating the appellant's counterclaim and enforcing the various items pro and con which might thereby be established. Until that was done, the Court could not be satisfied as to what was the final position on the issue of overpayment by the respondent to the appellant. Both investigations by the Court, on the claim and the counterclaim, were in my view equally forbidden by s. 18 of the Act; for taking an account, whether at common law or in equity, is just as much enforcing a claim as giving judgment for a liquidated claim. Where the mistake upon which a plaintiff relies to justify a claim for money had and received to his use is one that can only be ascertained by investigating betting accounts, the Court cannot lend its aid without transgressing the statute. It follows that the Court ought to have refused to look at the accounts and to have dismissed the action on the ground that it was being asked to enforce gaming contracts contrary to s. 18 of the Act of 1845.

I now deal with the second submission, namely, that even assuming the first objection to be insufficient, there was here no such mistake of fact as is essential to the rule of the common law that money paid in mistake of fact may be recovered.

The learned county court judge relied upon a dictum of

Channell J. in *Gasson* v. *Cole* (1), a case where the plaintiff was suing for money had and received in connection with bets on horse-racing. In that case the plaintiff acting as agent for the defendant, a bookmaker, had placed a bet for the defendant on a horse which had come in second, but which, on the first horse being held by the stewards to be disqualified, was declared the winner. The plaintiff collected the amount won on the bet, 275*l.*, and, believing that the defendant had really won, paid it over to him. After that the Jockey Club Committee reversed the stewards' decision, and the plaintiff sought to recover the 275*l.* from the defendant as money had and received on the ground that he had paid it in mistake of fact. There were other complications of fact in the case, but the above is a sufficient statement to explain the dictum, which is reported as follows: " During the argument he (the " learned judge) had asked Mr. Colam whether the rule that " money paid under a mistake of fact should be paid back " applied in a betting transaction. If it was a clear mistake of " fact, he thought that the person would be entitled to recover " the money back."

The case was decided against the plaintiff on other grounds, and thus Channell J.'s opinion never became the basis of decision. But the dictum embodies the legal basis of the county court judge's decision in favour of the respondent, and we have therefore to decide whether it is right or wrong. In my opinion it is wrong.

The main ground on which Mr. Micklethwait for the appellant sought to attack the dictum was that the action for money had and received founded on mistake of fact can never lie, unless the mistake is one which induces in the plaintiff's mind a belief that he is under some legal liability to the defendant from which the payment will wholly or in part discharge him. For reasons which I will give presently I do not think that he is entitled to succeed on this particular ground. But in my opinion there are two other grounds upon which his submission ought to succeed. In the first place there is the broad ground, explained by the Master of the Rolls,

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(1) 26 Times L. R. 468, 469.

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that the mistake inducing the payment here had not that fundamental character which is necessary to establish a cause of action for money had and received by reason of a mistake of fact. The second is that even if the mistake was sufficiently fundamental, s. 18 of the Gaming Act, 1845, affords what may be called a special defence where the mistake is about betting transactions. I will deal with this ground first. It is really only another aspect of the first ground of appeal.

Where the mistake relates to the amount of an honour credit for bets, the statutory veto upon the reception of evidence about gaming transactions, which I have discussed upon the first argument for the appellant, creates a special impediment, and in effect constitutes a special defence to the action for money had and received, by making it impossible to prove the mistake upon which the plaintiff is basing his claim. The position thus created is closely analogous to that which arose through the doctrine of ultra vires in *Sinclair* v. *Brougham* (1), where Lord Sumner (2) used the expression already quoted by the Master of the Rolls to the effect that a promise to repay will not be implied in law if an actual promise would in law be void. This special defence is in itself a sufficient reason for allowing the appeal.

Before adding what little I have to add to my Lord's discussion upon the essential nature of the action for money had and received when based on a mistake of fact, I will consider the particular argument advanced by Mr. Micklethwait. The well known passage in Bramwell B.'s judgment in *Aiken* v. *Short* (3) is perhaps the strongest statement of the proposition upon which he relied, but I agree with the Master of the Rolls that the facts of that case were not such as to make what the learned Baron there said the necessary basis of decision in that case. Indeed I do not think that this limiting proposition of the law about mistake of fact as one basis of the action for money had and received has ever been the direct subject of decision, although it has been frequently stated almost as if it were an accepted rule of law. I venture to

(1) [1914] A. C. 398.
(2) Ibid. 452.
(3) 25 L. J. (Ex.) 321, 324.

think that the mind of the Court was in all the cases where the statement has been made concentrated on the particular circumstances under discussion, and was expressing a conclusion appropriate to the facts before it rather than attempting to lay down any absolute or general rule of law. But as counsel for the appellant in the present appeal contended that there is such a rule of law, it is desirable to quote some of the leading expressions of judicial opinion upon which he relies, and all the more so as they are expressed in rather definite language.

In *Kelly* v. *Solari* (1) Parke B. said: "I think that where "money is paid to another under the influence of a mistake, "that is, upon the supposition that a specific fact is true, which "would entitle the other to the money, but which fact is "untrue, and the money would not have been paid if it had "been known to the payer that the fact was untrue, an action "will lie to recover it back."

In *Aiken* v. *Short* (2) per Bramwell B. (which is a rather fuller report than in 1 H. & N. at p. 215): "It seems to me "that the right to recover money paid under a mistake of "fact must have reference to a belief of the existence of a "fact which, if true, would have given the person receiving "a right against the person paying the money; and it never "can be applicable to a case where the fact mistaken is a "fact which would merely have made it desirable for the "person paying it to pay to the person receiving it. I do not "know whether that is a sufficiently comprehensive principle, "but it is one which has existed throughout in my mind."

In *The Bodega Co.* case (3), Farwell J. said of the passage last quoted: "That, I apprehend, means this. If "you are claiming to have money repaid on the ground of "mistake, you must show the mistake is one which led you to "suppose you were legally liable to pay."

In *Maskell* v. *Horner* (4), per Rowlatt J.: "The plaintiff "claims to recover these sums as paid under a mistake of "fact, or, alternatively, as paid not voluntarily, but to prevent

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(1) 9 M. & W. 54, 58.
(2) 25 L. J. (Ex.) 324.
(3) [1904] 1 Ch. 276, 286.
(4) [1915] 3 K. B. 106, 108.

"his goods being seized and under protest. I think it is "necessary to state two principles of law to which he appeals "and then to see if the circumstances bring him within either. "To recover under the first principle there must be a mistake "of fact and a fact going to the supposed liability. That is "laid down in *Kelly* v. *Solari* (1) and *Aiken* v. *Short.* (2) An "action on this ground, therefore, can only be brought by one "who pays, believing in his liability, because by mistake he "believes a fact upon which his liability depends." The case was decided in the Court of Appeal upon the ground that the payments were recoverable as having been made under protest to prevent seizure of the plaintiff's goods, and the above statement by Rowlatt J. remains a dictum.

The last citation I want to make is from the case of *Steam Saw Mills Co.* v. *Baring Brothers & Co.* (3) where Lord Sterndale M.R. said: "There seems to be ample authority for this, "that if a person, under a mistake of fact, pays money, which "he is not liable to pay, he may recover it back; but it makes "all the difference in the world whether the fact of which he "was ignorant would have discharged him from the liability "to pay."

In none of the above cases, as I have already said, not even in *Aiken* v. *Short* (4), was there a decision of the Court that the action failed simply because the mistake did not induce a belief of liability. And indeed in *Kerrison* v. *Glyn, Mills, Currie & Co.* (5) it was definitely decided by Hamilton J. and by the House of Lords that the plaintiff was entitled to recover a payment made to the defendants for the purpose of meeting an anticipated liability although he then knew that no actual liability had yet attached to him. The decision of the House of Lords seems to me conclusive that the rule as stated in *Aiken* v. *Short* (6) cannot be regarded as final and exhaustive in the sense that no mistake, which does not induce in the mind of the payer a belief that payment will discharge or reduce his liability, can ground an action for money had and received. It is, of course, obvious that such a belief must in fact have been induced in a very high percentage of mistaken payments giving rise to a dispute; in human affairs the vast majority of payments made without any fresh consideration are made to perform an obligation or discharge a liability; and I doubt not that performance of an obligation would be accounted discharge of a liability for the purpose of the *Aiken* v. *Short* (1) proposition. For this reason of human nature, that proposition is very often—and perhaps usually—a crucial test of the question whether the payment was in truth made by reason of a mistake or was merely voluntary and therefore irrecoverable. But I agree with the view of the Master of the Rolls that the final demarcation of the boundaries of the old action of money had and received has not yet been achieved, and that their final delineation can only be worked out as concrete cases arise and bring up new points for decision. And in refusing assent to the appellant's argument that the *Aiken* v. *Short* (1) proposition is of itself necessarily sufficient to fix the boundary, I desire to keep clearly open the possibility of the common law treating other types of payment in mistake as falling within the scope of the action for money had and received. Without expressing any opinion, I recognize, for instance, the possibility that there may be cases of charitable payments or other gifts made under a definite mistake of person to be benefited, or of the substantial nature of the transaction, where on consideration the old principles of the action might still, in spite of limiting decisions, be held to cover such circumstances.

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(1) 9 M. & W. 54.

(2) 1 H. & N. 210.

(3) [1922] 1 Ch. 244, 250.

(4) 1 H. & N. 210; 25 L. J. (Ex.) 321.

(5) 15 Com. Cas. 1; 17 Com. Cas. 41.

(6) 1 H. & N. 215; 25 L. J. (Ex.) 324.

This whole group of common law actions known as "implied "assumpsit" or "implied contract" permits the redress of so many widely different types of grievance, and thus is so useful in our jurisprudence, that it seems to me just as important not to cut them down as it is not to enlarge them beyond their true legal boundaries. And of them all the action for money had and received has the greatest variety of application and is perhaps the most useful. The name "implied contracts" is ambiguous, as it is often used of true consensual contracts,

(1) 1 H. & N. 210, 215; 25 L. J. (Ex.) 321, 324.

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which are not wholly expressed in writing or orally and have to be inferred in greater or lesser degree from the conduct of the parties. The implied contract for money had and received has no element of agreement about it; it is implied in law, the name being a misnomer. The history of implied contracts in the non-consensual sense has passed through two stages—the first during the 17th and 18th centuries, when it was being invented by the Courts and its range was ever expanding; the second from the middle of the 19th century, since when the pendulum has swung the other way and our common law Courts have tended to restrict it. It is not relevant to the present case to consider that history in detail, but the 14th Lecture by the late Professor Ames upon Implied Assumpsit printed in his Lectures on Legal History (Harvard 1913, p. 149) is full of illumination. He brings out clearly the complete absence of any consensual element. There is no doubt that the moral principle of "unjust enrichment," to which he refers and which is recognized in some systems of law as a definite legal principle, and indeed underlay Lord Mansfield's famous dictum in *Moses* v. *Macferlan* (1) in the year 1760, has now been rejected by English Courts as a universal or complete legal touchstone whereby to test this cause of action. But Professor Ames was as late as the early years of the present century still treating that principle as the underlying source of obligation upon the basis of which the action had been developed in our common law: see pp. 160 and 166. Leake devoted a long sub-division of the First Edition of his book on Contracts (published in 1867) to the title of "Contracts "Implied in Law" (pp. 38 to 75) and commenced it with these two paragraphs: "Simple contracts arising independently "of agreement, or contracts implied in law, include those "transactions affecting the two parties, other than agreement "between them, upon which the law operates by imposing a "contract, that is, a liability on the one side and correlative "right on the other." "The transactions between two "parties, other than agreement, which give rise to contracts, "may be described generally as importing that some undue

(1) 2 Burr. 1005.

"pecuniary inequality exists in the one party relatively to "the other, which justice and equity require should be "compensated, and upon which the law operates by creating "a debt to the amount of the required compensation."

The Third Edition of Bullen & Leake (1868) at p. 44 under the title of the "indebitatus count for money had and "received," repeated the effect of the second of the above sentences; so did Professor Dicey in his book on Parties to an Action, published in 1870, at p. 91.

So wide a statement of the principle upon which the action for money had and received is founded, however eminent the jurists who supported it, does not at the present time afford an authoritative criterion by which the Court can decide whether a given claim discloses a cause of action for money had and received. The test is too vague; and even if it was ever a test, it has certainly been modified by recent decisions which have restricted the field of this action: see *Baylis* v. *Bishop of London* (1), per Hamilton L.J.; *Sinclair* v. *Brougham* (2), per the same learned judge as Lord Sumner; and *Holt* v. *Markham* (3), per Scrutton L.J. But my citations from jurists of such high standing as writers on the common law do emphasize the importance of trying to find some common positive principles upon which these causes of action called "implied contracts" can be said to rest, and which will not altogether exclude that of unjust enrichment embodied in those citations.

An additional reason for keeping the door open is the very heterogeneous list of causes of action which unquestionably fall within this field of implied contracts. They are so various in kind as almost irresistibly to invite the inference that there may be one or more unifying principles upon which they rest. If one takes the action for money had and received by way of illustration of this point, one finds assembled under that heading the following wholly different types of causes: (1.) money paid in mistake of fact; (2.) money paid for a consideration which has failed; (3.) money paid because it

(1) [1913] 1 Ch. 127, 140.
(2) [1914] A. C. 398, 453.
(3) [1923] 1 K. B. 504, 513.

was extorted colore officii, or by duress, etc. ; (4.) cases where the plaintiff has had an actionable wrong done him by the defendant, and "waiving the tort" sues in assumpsit—whether any of his money has actually passed from himself to the defendant or not. In this context I venture humbly and respectfully to doubt whether the criterion suggested by Viscount Haldane L.C. in *Sinclair* v. *Brougham* (1) that "the fiction" (i.e., the common law fiction of an implied contract) "can only be set up with effect if such a contract "would be valid if it really existed" is consistent with the common law history of these implied contracts ; for some of them are quite incapable of formulation as real—i.e., consensual—contracts.

But I am in complete agreement with the Master of the Rolls that there is a plain principle applicable to all those cases of payments in mistake of fact, and that is that the mistake must be in some aspect or another fundamental to the transaction. On the facts of this case there was no fundamental mistake. To pay 24*l.* for a betting debt is just as much in the eye of the law a purely voluntary gift as a wedding present of 24*l.* : the law prevents the plaintiff from saying that he intended anything but a present. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant : *Ingledew, Sons & Brown, for Moxon & Petty, Newport, Mon.*

Solicitors for respondent : *Gibson & Weldon, for Everett & Everett, Pontypool.*

(1) [1914] A. C. 398, 415.

R. F. S.

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April 15, 16
May 11.

LITTLEJOHN *v.* LONDON COUNTY COUNCIL.

Local government—Poor law officers—Relieving officer—Transfer to service of London County Council—New contract of service—Increase of rate of pay—Rule as to sick pay at half rate—No consent of Minister of Health to rule—Validity of contract—Local Government Act, 1929 (19 *Geo.* 5, *c.* 17), *ss.* 1, 119, 121—*Public Assistance Order,* 1930 (*St. R. & O.* 1930, *No.* 185), *arts.* 142, 144, 157, 162.

The Local Government Act, 1929, provided by s. 1 for the transfer on the appointed day of the functions of poor law authorities and, by s. 119, of the services of poor law officers.

Sect. 121 provided that on transfer such officers should hold office on the same terms and salary as if the Act had not been passed.

The Public Assistance Order, 1930, by arts. 142 and 144, made a relieving officer a senior poor law officer.

By art. 157: "A senior poor law officer shall continue to hold "office until he dies, or resigns, or retires on superannuation, or is "dismissed by the Council subject to the consent of the Minister, or "is removed by the Minister."

By art. 162 (2.): "The Council shall not, without the consent "of the Minister, reduce the remuneration of a senior poor law "officer."

The plaintiff before April 1, 1930, the appointed day, was a poor law relieving officer in the service of the Stepney Guardians. On the appointed day in 1930 he was automatically transferred to the service of the London County Council. By letter dated December 7, 1932, the London County Council offered the plaintiff a new contract of service with a substantially increased scale of remuneration. The letter stated that the revised scales and conditions of service, if accepted, must be taken as a whole. With the letter was enclosed a printed document containing the conditions of transfer and a summary of the Council's Orders, etc. Under that heading appeared a clause headed "Sick Pay." "Full pay "for a reasonable period at the discretion of the appropriate sub-"committee of the Public Assistance Committee." The plaintiff accepted the offer on the following day. The consent of the Minister had not been obtained to the rule as to sick pay. From December 8, 1933, until September 30, 1934, when the plaintiff left the Council's service on superannuation, he was continuously and wholly incapacitated by illness of the eyes from performing any of the duties of his contract of service. He received full salary to the end of July, 1934, a period of nearly eight months, and half-pay during August and September. He claimed to recover the balance of salary in respect of a period when his pay was reduced for sickness, alleging that under arts. 157 and 162 of the Public Assistance Order, 1930, he continued in his office on full pay until he retired on superannuation on September 30, 1934.

The county court judge dismissed the claim, holding that a reasonable time had elapsed during which full pay was paid to the plaintiff. On appeal:—

Held, dismissing the appeal, that under the contract of December 7, 1932, the plaintiff obtained a new scale of remuneration, substantially more advantageous than he had before, consisting partly of normal pay and partly of sick pay; that by obtaining sick pay rights which he did not have before he got a new advantage which was part of his remuneration; and that the clause as to sick pay conferred upon the appropriate sub-committee a contractual right to do everything that was in fact done.

The application of the sick pay rule on the lines of the present case, namely of allowing an officer wholly incapacitated for duty eight months on full pay and an additional two months on half-pay, was not a reduction of the plaintiff's remuneration within the meaning of art. 162 of the Public Assistance Order, 1930.

APPEAL from a decision of His Honour Judge Bensley Wells at Southwark County Court.

The plaintiff, Littlejohn, sued the London County Council to recover the sum of 32*l*. 2*s*. 6*d*. balance of salary alleged to be due to him in his capacity of a district relieving officer in the service of the Council in respect of a period when his pay was reduced for sickness.

From 1914 to September 30, 1934, the plaintiff was a poor law relieving officer. Until transferred to the London County Council he was in the service of the Stepney Guardians. On the appointed day in 1930 he was, by force of s. 119 of the Local Government Act, 1929, transferred automatically to the service of the London County Council. Before transfer he had been entitled to an annual salary rising from 300*l*. by 10*l*. annual increments up to a maximum of 350*l*. At the moment of his transfer he was receiving 340*l*. per annum. By letter dated December 7, 1932, the London County Council offered the plaintiff a new contract of service in the grade of district relieving officer at a commencing rate of 360*l*. rising by 15*l*. annual increments to 450*l*. This offer he accepted by letter next day.

From December, 1932, to December, 1933, the plaintiff served the London County Council under this new contract as district relieving officer, being paid salary in accordance with its terms; but in that month his eyes gave serious trouble, and

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from December 8, 1933, until September 30, 1934, when he left the Council's service on superannuation, he was continuously and wholly incapacitated by illness of the eyes from performing any of the duties of his contract of service. The appropriate sub-committee of the Public Assistance Committee of the Council showed him great consideration, and in its discretion decided that he should receive, and he did receive, full salary to the end of July, 1934, a period of nearly eight months. Various letters passed between the plaintiff and the Council, from which it was clear that he asked for and was given an extension of sick pay. He was retired from the service on superannuation on September 30, 1934, on account of ill-health. The plaintiff was in fact paid 10*s.* short of full pay in July, 16*l.* 10*s.* short in August, and 15*l.* 6*s.* 8*d.* short in September, this being correct for the half-rate scale of sick pay.

The letter sent by the London County Council on December 7, 1932, to the officers of the relief staff in the Public Assistance Department, including the plaintiff, was in print and contained the offer of an " option of being placed on the "revised grading and scales of salary," with particular terms individually addressed to each recipient inserted in ink. In the case of the appellant the written part offered a substantially increased scale of remuneration, with retrospective operation from October 1, 1931.

The printed paragraphs included the following sentences :—

" I attach for your information a statement of (1.) the "conditions governing your proposed transfer to the Council's "classification, and (2.) a summary of some of the Council's "standing Orders, regulations and rules applicable to the relief "staff of the Public Assistance Department."

" I shall be glad if you will inform me as soon as possible "but not later than fourteen days from the date of this letter, "on the form of certificate appended, whether you desire to be "placed on the Council's classification in accordance with the "terms set out in their letter and enclosures and agree to such "modifications of your contract of service as are necessary to "give effect thereto. The revised scales and conditions of "service, if accepted, must be taken as a whole."

The letter was sent in duplicate with the form of certificate of acceptance printed at the foot of the back, one copy to be returned, signed and witnessed. This was duly done by the appellant, whose acceptance was unqualified.

The document enclosed in the letter was also in print, Part I. of which contained the " Conditions of Transfer," which the letter said were sent " for your information." It began with a sentence in brackets " (subject, in any appropriate case, to the "provisions of the Local Government Act, 1929, or the Public "Assistance Order, 1930)." It then continued, so far as relevant to senior poor law officers, of whom the plaintiff was one, " that "the person transferred shall give his whole time to the duties "of his office." Part II. was a summary of the Council's Orders, etc. Under that heading appeared a clause headed, " Sick Pay." " Full pay for a reasonable period at the discretion of the appro-"priate sub-committee of the Public Assistance Committee," and also a clause providing an age limit for retirement.

It was agreed that the consent of the Minister of Health had not been obtained to the rule as to sick pay.

Under the Local Government Board's General Order of 1879, " Every relieving officer, appointed after February 28, " 1879, shall continue to hold office until he . . . . die, or resign, "or be dismissed by the Guardians subject to the consent of "the Local Government Board."

The Local Government Act, 1929, provided by s. 1 for the transfer on the appointed day of the functions of poor law authorities and by s. 119 of the services of poor law officers. Sect. 121 provided that on transfer such officers should hold office on the same terms and salary as if the Act had not been passed.

The Public Assistance Order, 1930, by arts. 142 and 144, made the plaintiff a senior poor law officer. Art. 157 provided that : " A senior poor law officer shall continue to hold office "until he dies, or resigns, or retires on superannuation, or is dis-"missed by the Council subject to the consent of the Minister, or "is removed by the Minister. . . . ." Art. 162 (2.) provided that " the Council shall not, without the consent of the Minister, "reduce the remuneration of a senior poor law officer. . . . . "

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The county court judge dismissed the plaintiff's claim, holding that a reasonable time was allowed during which full pay was paid to the plaintiff, and secondly that the discretion of the appropriate sub-committee of the Public Assistance Committee had been exercised with sympathetic consideration.

The plaintiff appealed.

E. G. Woodward for the appellant. Having regard to arts. 157 and 162 of the Public Assistance Order, 1930, the appellant continued in his office on full pay until he retired on superannuation on September 30, 1934. When the London County Council attempted to put him on sick pay at half his full pay they did so without authority, inasmuch as the consent of the Minister of Health had not been obtained to the rule as to sick pay, as is required by art. 162. The offer of the London County Council of December 7, 1932, of a new contract of service was made and was accepted by the appellant, subject to the provisions of the Public Assistance Order, 1930, which meant that he only agreed to the provisions as to sick pay contained in the offer, which amounted to a reduction of his pay, if such provision had been approved by the Minister. The letter of December 7, 1932, and the enclosure sent with it were printed documents, and therefore must be read according to the position of the person to whom they were sent, and therefore in the case of a senior poor law officer they could not take away his rights as to pay. The documents cannot be construed as constituting an agreement altering the rights of the appellant under s. 121 of the Local Government Act, 1929. The London County Council by their defence say that regulations as to sick pay which were made by the Stepney Guardians in October, 1927, continued to apply to the appellant. The consent of the Minister of Health had, however, not been obtained to those regulations, and therefore they did not apply to senior poor law officers, of whom the appellant was one, under art. 144 of the Public Assistance Order, 1930. The regulations made by the Stepney Guardians in 1927 could never have applied to the appellant by reason of arts. 172, 173 and 187 of the General

Consolidated Order of 1847. Under art. 172: "The guardians "shall pay to the several officers and assistants appointed to or "holding any office or employment under this Order, such "salaries or remuneration as the Commissioners may from time "to time direct or approve." Under art. 173: "The salary of "every officer or assistant appointed to, or holding any office or "employment under this Order, shall be payable up to the day "on which he ceases to hold such office or employment, and no "longer." Under art. 187: "Every officer appointed to or "holding any office under this Order, other than a medical "officer, shall continue to hold the same until he die, or resign, or "be removed by the Commissioners, or be proved to be insane, to "the satisfaction of the Commissioners."

The London County Council contend that the Stepney regulations of 1927 with reference to sick pay were applicable to the appellant, and continued to apply to him by virtue of art. 8 of the Public Assistance Order of 1930, the proviso to which said: "Provided that . . . . the provisions of any regulations "applicable to him in relation to his tenure of office remuneration "and conditions of service shall continue to apply to him as if "this Order had not been made." The appellant, however, contends that as those regulations were made without the consent of the Minister of Health they did not apply to him. The regulations were no doubt valid regulations and applied to a large number of poor law officers who were not senior poor law officers. The regulations made by the London County Council in 1932, which purported to reduce the pay of their poor law officers when sick, are not applicable to the appellant, as they have not received the approval of the Minister of Health, and further they are contrary to art. 162 of the Public Assistance Order, 1930, under which "the Council "shall not, without the consent of the Minister, reduce the "remuneration of a senior poor law officer."

van den Berg K.C. and *Moelwyn Hughes* for the respondents. The true position is that the appellant is bound by his contract of December 7, 1932, by which he agreed to accept the respondents' provisions as to sick pay. If by reason of art. 162 of the Public Assistance Order, 1930, it can be said that the provision as to sick pay is not applicable, one must then look at the Order as a whole, and when that is done it will be seen that by reason of art. 8 the regulations made by the Stepney Guardians in October, 1927, apply to the appellant, and under those provisions the appellant is only entitled to six months' sick pay. Those regulations are effective without the Minister of Health's approval. If the contention on behalf of the appellant is correct he could go on drawing pay for ever. A distinction must be drawn between the right to receive salary for services rendered and a right to draw sick pay. If the true position is, as the appellant contends, that the regulations of 1927 and 1932 do not apply to him then there is no regulation entitling him to sick pay. If a person is in employment there is an implied term that he will render services for the salary paid to him, and if he is unable to render such services by reason of permanent ill-health there is a frustration. There is no implication of law that if a man cannot perform the services that he has agreed to render he should nevertheless continue to receive pay. The trade unions pressed for pay to poor law officers during sickness. The Stepney regulations were made in 1927 providing for sick pay for six months. The trade unions then pressed for better terms, and the London County Council regulations for sick pay were made providing for half-pay after full pay for a reasonable period during sickness. A mere temporary illness would not be construed as a frustration, but in this case it was found at a very early period that the appellant had become permanently unfit to perform his duties. "Salary" means remuneration for services rendered. "Sick pay" rests upon an entirely different consideration: it is paid for past services coupled with an expectation of future services. When it becomes clear that a man cannot perform in the future the services he has agreed to render then his right to a salary is terminated. The regulations of 1927 and 1932 apply to the appellant. There is nothing in any regulation to prevent a poor law officer from entering into a contract in order to improve his position. There is nothing to prevent an officer in a lower grade from entering into a contract by which he would become entitled to a higher rate of pay. It would be very curious if the Minister of Health could interfere and prevent an officer entering into such a contract. Art. 162 of the Public Assistance Order, 1930, only prevents a Council from reducing an officer's remuneration. There is, however, nothing in that article which takes away an officer's right to enter voluntarily into a contract which would be binding upon the parties. There is nothing in the arrangement which the appellant entered into in December, 1932, which can be said to be a reduction of remuneration. When the appellant received sick pay after receiving full pay during eight months while performing no services he was not having his remuneration reduced but was receiving a gratuity. Art. 162 deals with a unilateral act on the part of a Council; it does not interfere with the freedom of contract. There is nothing in art. 162 which displaces the normal construction which would be put upon the letter of December 7, 1932. Apart from the regulations dealing with sick pay there is nothing in the regulations which deals with the case of an officer who is not rendering any services owing to sickness and is not dismissed. The word "suspension" in art. 158: "If a senior poor law officer is "suspended from the performance of his duties . . . ." has no reference to an officer who does not perform his services owing to illness, but refers to suspension as a disciplinary measure. There is nothing in the Order of 1930 which prevents the respondent Council making a provision as to sick pay. There is nothing in either the 1847 Order or the 1879 Order which gives the appellant a right to sick pay. The Order of 1847 only contained provisions for the payment of salary for services rendered. There was nothing in arts. 172 and 173 of the Order of 1847 which required the consent of the Minister of Health before parties could deal with the question of sick pay. Scrutton L.J. stated the law with reference to this matter in *Warburton* v. *Co-operative Wholesale Society, Ld.* (1) as follows: "Under decided cases a servant incapacitated by illness and "in the absence of notice under the contract does not cease "to be employed unless the illness is such as seriously to

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(1) [1917] 1 K. B. 663, 668.

"interfere with or frustrate the business purpose of the contract." It was held in *Cuckson* v. *Stones* (1) that mere absence from work owing to temporary illness or accident does not determine the contract of service. If an officer wishes to determine his contract of service, the consent of the Minister of Health is not required; he only intervenes if the Council wish to dismiss the officer. The regulations do not touch the common law position—namely, that if the servant cannot perform his services permanently through illness the business purpose of the contract is frustrated, and the servant is not entitled to remuneration for services which have not been rendered.

The crux of the matter is that the workman should perform the services he has contracted to render before he is entitled to remuneration for those services. It was held in *Storey* v. *Fulham Steel Works Co.* (2) that the true test was whether the illness was such as to put an end in a business sense to the engagement and to frustrate the object of the engagement. In *Niblett* v. *Midland Ry.* (3) a servant of a railway company was required to join and did join the railway company's friendly society. Under the rules of the society a member was entitled to sick pay during sickness, but he was not entitled to sick pay while receiving wages from the company. In August, 1904, the servant became ill and received sick pay for a fortnight, during which time he did not ask for or receive wages. In February, 1905, he became ill again and received sick pay until the following September, when the company gave him notice to terminate his employment. He then claimed wages from February, 1905, until his discharge; but it was held that he was not entitled to wages during that period. Remuneration is paid for services rendered, and the law says that that payment will continue during illness for a reasonable period; but when it becomes clear that the incapacity has become permanent then the doctrine of frustration applies. There has been no reduction in the remuneration of the appellant. There

(1) (1858) 1 E. & E. 248.
(2) (1907) 24 Times L. R. 89.
(3) (1907) 23 Times L. R. 240.

was no provision for sick pay until the Stepney Regulations of 1927. The regulation granting sick pay is no reduction of remuneration, but it is an added right which otherwise the appellant would not have, since pay is remuneration for services rendered. Under the contract of December, 1932, the appellant received additional remuneration and in addition a right to sick pay.

E. G. Woodward in reply. There are statutory provisions in the present case which qualify the common law position of the appellant. The Council could under art. 157 have called upon the appellant to retire on superannuation for bodily or mental incapacity. The consent of the Minister, although required for the dismissal of a poor law officer, is not required for the retiring of an officer upon superannuation. Under art. 173 of the General Consolidated Order, 1847, which was in operation when the appellant entered the service of the Stepney Guardians in 1914 as a poor law relieving officer, "the salary of every officer, "or assistant, appointed to, or holding any office or "employment under this Order, shall be payable up to the day "on which he ceases to hold such office or employment, and no "longer," and therefore there is no room for sick pay, as he was entitled to receive full pay up to the day on which he left his employment. The common law is so qualified by these regulations that there is no room for the application of the doctrine of frustration.

Cur. adv. vult.

1937. May 11. SCOTT L.J. read the judgment of the Court, consisting of SCOTT L.J. and FINLAY J.: The appellant was plaintiff in the Court below and sued the London County Council for the sum of 32*l.* 2*s.* 6*d.*, balance of salary alleged to be due to him in his capacity of a district relieving officer in the service of the Council, in respect of a period when his pay was reduced for sickness.

The facts were not in dispute, the case being tried upon the admissions contained in the pleadings, upon the facts stated in and the inferences of fact to be gathered from the correspondence between the respondents' chief officer of public assistance and the appellant during the months of the appellant's incapacity and one or two further facts agreed between counsel at the trial or before us.

We were told by counsel for the appellant that the action is in the nature of a test action, brought at the instance of the Metropolitan Relieving Officers' Association, of which the appellant was a member, in order to obtain a binding decision on certain questions of interpretation of the relevant statutes and regulations and of a standard form of contract of service, into which transferred poor law officers were invited by the respondent Council to enter in 1932.

The facts are simple. From 1914 onwards to September 30, 1934, the appellant was a poor law relieving officer. Until transferred to the London County Council he was in the service of the Stepney Guardians. On the appointed day in 1930 he was, by force of s. 119 of the Local Government Act, 1929, transferred automatically to the service of the respondent Council. Before transfer he had been entitled to an annual salary rising from 300*l*. by 10*l*. annual increments up to a maximum of 350*l*. At the moment of transfer he was receiving 340*l*. per annum. By letter dated December 7, 1932, the respondent Council offered him a new contract of service in the grade of district relieving officer at a commencing rate of 360*l*. rising by 15*l*. annual increments to 450*l*. This offer he accepted by letter next day. It is on the interpretation of this contract, as affected by certain statutory provisions and rules, that the contest in the appeal turns.

From December, 1932, to December, 1933, the appellant served the London County Council under this new contract as district relieving officer for Stepney, being paid salary in accordance with its terms; but in that month his eyes gave serious trouble, and from the 8th of that month until September 30, 1934, when he left the Council's service on superannuation, he was continuously and wholly incapacitated by illness of the eyes from performing any of the duties of his contract of service. "The appropriate Sub-Committee" of the Public Assistance Committee of the Council (see the sick-pay clause in the statement enclosed in the letter of December 7, 1932) showed him great consideration, as appears from the correspondence passing whilst he was disabled, and in its discretion it decided that he should receive, and he did receive, full salary to the end of July, 1934, that is to say, for a period of nearly eight months. No oral evidence having been given at the trial, we think it desirable to refer to these letters, as they contain all the evidence there is relating to the reduction in rate of payment and the retirement of the appellant (it having been agreed by counsel that the facts stated or implied in them should be regarded as in evidence).

On April 19, 1934, the respondents' chief officer of public assistance wrote to the appellant a letter saying that the Council's examining medical officer had certified him as permanently unfit to carry out his ordinary duties on the ground of ill-health. The letter was obviously in standard form for such cases. It offered a medical appeal within a week, and it ended: "in the event of your not lodging an "appeal within the time specified, the facts will be reported to "the Committee of the Council concerned, with a view to your "being retired from the service." The appellant replied next day that he was going to be operated on in a fortnight and three weeks after that would know whether his sight would be restored or not. He accordingly asked if sick leave could be extended to six months, and added that if it were possible he would be very grateful. The six months would run to July 8.

On May 3 the chief officer replied: "In view of the special "circumstances of your case, it has been decided that "consideration of the question of your retirement from the "service of the Council should be deferred for two months, and "that you should then be again medically examined." Nothing further appears till August 11, when another standard form letter was sent to the appellant. From this it appears that he had again been medically examined, and again found permanently unfit. On the 15th the appellant replied that he could not challenge the medical position, and thanked all concerned for the kindness he had received. On August 27 the chief officer gave the appellant a provisional notice that: " Arrangements are being made for you to be retired from the "service on account of ill-health, 30th September, 1934, to be "regarded as your last day of service. A further communication "will be addressed to you when the question of your retirement "has been considered by the appropriate Committee of the "Council." On September 21 the chief officer sent this further intimation—namely, that the appropriate Committee had definitely decided that September 30 was to be his last day of service, and added that: " The Comptroller of the Council "will communicate with you in due course in regard to your "retiring allowance." It was agreed by counsel that the appellant did retire on September 30, on superannuation.

It is pleaded in para. 9 of the defence that on May 24 " the appropriate Sub-Committee " resolved in its discretion to pay the appellant full rate of salary to July 31, any payments thereafter to be at half rates. No statement to this effect was conveyed to the appellant in the letters; it was not proved orally; and it was not admitted by counsel for the appellant at the trial; it must therefore be disregarded.

The appellant was in fact paid 10*s.* short of full pay in July—was this for July 31 at half rate?—16*l.* 10*s.* short in August and 15*l.* 6*s.* 6*d.* in September—we presume at the end of each month. Counsel agreed to treat the figures as correct for the half-rate scale of sick pay.

In order even to state the rival contentions of the parties, and also to understand the judgment of the learned county court judge, it is necessary to refer to the statutory provisions and rules affecting the position. Indeed their bearing on the contract of December 7–8, 1932, is the chief battleground in the case.

By the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 46, the Poor Law Commissioners were given power to direct the overseers or guardians to appoint officers, to define the officers' duties, and to determine their remuneration. By s. 15 they were empowered to make regulations by Order. In the course of history the Commissioners became the Poor Law Board, then the Local Government Board, then the

Ministry of Health. By art. 153 of the General Order (Consolidated) of 1847, Guardians were directed to appoint officers, including "relieving officers"; by arts. 172 and 173 to pay them such salary as the Commissioners might approve, payable so long as the officer might hold the office. Art. 187 provided for a life appointment, but this article was, by the Local Government Board's General Order of 1879, replaced by the following provision: "Every relieving officer, "appointed after the twenty-eighth day of February, 1879, "shall continue to hold office until he . . . . die, or resign, or "be dismissed by the Guardians subject to the consent of the "Local Government Board."

The Local Government Act, 1929, provided for the transfer on the appointed day of the functions of poor law authorities (s. 1) and of the services of poor law officers (s. 119) to the County Councils. Sect. 121 provided that on transfer such officers should hold office on the same terms and salary as if the Act had not been passed.

In order to see what the relevant terms of the appellant's contract with the Guardians were, it is again necessary to look back in history.

In 1927 the Stepney Guardians, apparently acting in their administrative capacity, made a set of so-called "regulations" governing leave of absence of officers, which included provision for sick pay to the class of "Permanent Officers and Servants" of which the appellant was one, at full salary (less "emoluments" and National Health Insurance Benefit), but for a period not longer than twenty-six weeks in any consecutive twelve months, and subject to the proviso that "the Guardians may, at any time during the course of the "absence from duty of any officer, or servant, owing to illness, "consider the circumstances of such absence relative to the "termination of services, or the continuance of sick pay on "the same or different conditions." This proviso would, we think, if enforceable as a term of an officer's contract, give the Guardians power in a proper case to reduce the sick pay rate and in their discretion even to terminate the engagement. The respondent Council contended that this regulation had

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become operative in the appellant's case, presumably on the assumption that he had agreed to it. The twenty-six weeks' provision was pleaded by the respondent Council in the defence, paras. 2 and 4, and also para. 5, where it is coupled with the Public Assistance Order, 1930. That Order has statutory effect (see Poor Law Act, 1930, s. 136, sub-s. 2), and the reference in para. 5 of the defence is to the proviso to art. 8 of that Order, which says (inter alia) that "the "provisions of any regulations applicable to" [an officer] "in relation to his tenure of office remuneration and conditions "of service shall continue to apply to him as if this Order had "not been made." On this it was argued before us for the respondent Council that the provisions we have quoted from the Stepney Regulations became terms of the appellant's contract with the respondent Council when he was transferred and gave the latter discretion during the appellant's incapacity by sickness to stop his full scale salary and substitute sick-pay at half rate; and also, I may add parenthetically, to insist on the termination of the service on September 30. In regard to this last point no objection was at any time raised by the appellant; he apparently did not dispute the Council's right to terminate his employment on September 30.

To the argument for the respondent Council that the Stepney Guardians' regulations of 1927 were thus imported by force of law into the contract of December, 1932, between the appellant and the respondent Council, the appellant's counsel answered that those regulations never came into force at all, because under arts. 172 and 173 of the General Order of 1847, which still had statutory effect when the Stepney Guardians tried to make their regulations, the Guardians had no power to withhold from an officer as long as he remained in their service the full rate of salary directed or approved by the Minister of Health (as successor to the Poor Law Commissioners), and therefore could not by regulation give themselves power to make any alteration in it without the consent of the Minister to the alteration. It was in doubt in the Court below whether the consent of the Minister had been obtained, and the learned judge presumed that it had; but we were definitely informed by counsel that it had not. We do not think it necessary to express any final opinion upon the question thus raised, as in our view the appeal can properly be decided without reference to the regulations of 1927. The decision of it will depend on the effect of the contract of December, 1932, in the light of the relevant articles of the Public Assistance Order, 1930, other than art. 8.

We now proceed to consider that written contract. Upon transfer to the London County Council in 1930 the appellant continued at his old work receiving his old rate of pay. After an interval for reflection upon the appropriate arrangements for the due performance of their new poor law duties, the respondent Council on December 7, 1932, addressed to the officers of its relief staff in the Public Assistance Department a printed letter containing the offer of an " option of being placed "on the revised grading and scales of salaries," with particular terms individually addressed to each recipient inserted in ink. In the case of the appellant the written part offered a substantially increased scale of remuneration, with retrospective operation from October 1, 1931. The printed paragraphs included these sentences (which I have lettered for convenience) :—

(A) " I attach for your information a statement of (1.) the "conditions governing your proposed transfer to the Council's "classification, and (2.) a summary of some of the principal "provisions of the Council's standing orders, regulations and "rules applicable to the relief staff of the Public Assistance "Department." (B) " I shall be glad if you will inform me as "soon as possible but not later than fourteen days from the date "of this letter, on the form of certificate appended, whether you "desire to be placed on the Council's classification in accordance "with the terms set out in their letter and enclosure and agree "to such modifications of your contract of service as are necessary "to give effect thereto. The revised scales and conditions of "service, if accepted, must be taken as a whole." (C) " A "transferred officer will be deemed to have waived the right "(if any) to compensation under the Act (viz. : the Local Government Act, 1929) in respect of any pecuniary loss which might "be involved by acceptance of the revised scale and conditions." The letter was sent in duplicate with the form of certificate of acceptance printed at the foot on the back, one copy to be returned, signed and witnessed. This was duly done by the appellant, whose acceptance was unqualified.

The document enclosed in the letter was also in print, except for references to the date of the letter and the name. Part I. contained the " Conditions of Transfer " which the letter said were sent " for your information." It began with a sentence in brackets " (Subject, in any appropriate case, to the provisions of the Local Government Act, 1929, or the Public "Assistance Order, 1930)." It then continued, so far as relevant to senior poor law officers (the appellant was one, as I will explain in a moment), " that the person transferred shall give "his whole time to the duties of his office " and contained other terms which I need not quote. Part II. was the summary of the Council's Orders, etc. Under that heading appeared a clause headed, " Sick Pay " : " Full pay for a reasonable "period at the discretion of the appropriate sub-committee of "the Public Assistance Committee " ; and also a clause providing an age limit for retirement.

If the bracketed sentence at the beginning of the enclosed Conditions of Transfer be for the moment disregarded, it is difficult to see what argument could be open to the appellant. He deliberately accepted the offer made. Under that contract permanent incapacity from ill-health would, after the lapse of a reasonable time to permit of the fact being really established, be a final disqualification for the office; for it would thenceforth be impossible for the officer to prove that he was ready and willing to perform his part of the contract, and the contract would be frustrated.

The clause about sick pay provided for a reasonable length of test, but left the judgment of the matter to the absolute discretion of " the appropriate sub-committee." There is no possible doubt on the finding of the learned county court judge, first, that a reasonable time was allowed, and secondly, that the discretion of the sub-committee was exercised with sympathetic consideration. Instead of retiring the appellant, as we think they were entitled to do when in the course of July the examining doctor again found his case hopeless, they gave him sick pay at half rate during a period of another two months, when he was still wholly unable to perform any part of his side of the contract and was not entitled to claim any salary at all. If the appropriate sub-committee had said to him in words written or spoken : " The intimation we gave you "in May must now be acted on and we treat the contract as at "an end save that we will give you sick pay at half rate for "another two months," the appellant would have had no ground for objecting.

In the absence of any specified finding by the county court judge that some communication was made to the appellant to the above effect, we do not think it is open to us to infer it ; and if the case depended upon this question of fact, we think it would have to be sent back for further evidence. It is clear that the respondent Council did not exercise the right of election which they had of treating the contract of employment as being at an end at any date before September 30, and the question for decision must therefore necessarily be, first, whether the sick pay clause in the contract entitled them as from July 31, 1934, to give sick pay at a lower rate than full pay ; and if they were so entitled on the clause, secondly, whether there is anything in the provisions of the Public Assistance Order, 1930, which prevented the clause from being applied in accordance with its natural meaning. On the construction of the clause we are of opinion that it did confer upon the appropriate sub-committee a contractual right to do everything that was in fact done.

Counsel for the appellant, however, argued that the Public Assistance Order overrode that clause and prevented its operation in accordance with its natural meaning. His argument was as follows : By arts. 142 and 144 the appellant was a senior poor law officer. Art. 157 provides that : " A senior "poor law officer shall continue to hold office until he dies, or "resigns, or retires on superannuation, or is dismissed by the "Council subject to the consent of the Minister, or is removed "by the Minister." And by art. 162 the Council had no power without the consent of the Minister to reduce the remuneration

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of a senior poor law officer. On the basis of these two articles it was argued that the appellant continued in his office on full pay until he retired on superannuation on September 30, and that when the Council attempted to put him on sick pay at half rate they did so without authority under art. 162, it being agreed that the consent of the Minister was not obtained, and therefore in breach of the contract.

In our opinion this argument is fallacious. Under the contract of December, 1932, the appellant obtained a new scale of remuneration, substantially more advantageous than he had had before, consisting partly of normal, partly of sick pay. When he was fully fit for his duties, the money rate was substantially higher. When he was sick, he was to get the advantages of the Sick Pay Rules. We do not think the appellant's remuneration was reduced within the meaning of art. 162. Ex hypothesi the appellant had no sick pay rights when he made his new contract in December, 1932. To be employed on the terms of whole salary or dismissal is in the case of prolonged illness most disadvantageous to the servant. Getting sick pay rights he got a new advantage which was part of his remuneration. In addition, the cash payment when in health was a considerable rise. The " remuneration " of the appellant must be looked at as a whole. We do not think that an application of the Sick Pay Rule on the lines of the present case, namely, of allowing an officer, wholly incapacitated for duty, eight months on full pay, and an additional two months on half-pay, is a reduction of his remuneration under the December, 1932, contract within the meaning of art. 162 of the Poor Law Assistance Order. In our opinion the appellant was not only treated with kindness, but in strict accordance with his contract.

This interpretation of the contract in the light of the statutory regulations bearing on it in a sense favourable to the respondent Council determines the appeal, and renders it unnecessary to consider the alternative answer submitted by Mr. van den Berg, on the respondent Council's behalf, based upon the cases of *Warburton* v. *Co-operative Wholesale Society, Ld.* (1);

(1) [1917] 1 K. B. 663.

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Cuckson v. *Stones* (1) ; *Storey* v. *Fulham Steel Works Co.* (2) ; and *Niblett* v. *Midland Ry.* (3) We express no opinion upon that argument beyond pointing out that on the facts here in evidence it seems difficult, if not impossible, to hold that the contract of service came to an end at any date before September 30. The appeal must be dismissed with costs.

Appeal dismissed.
Leave to appeal to House of Lords granted.

Solicitor for appellant : *Edward Fail.*

Solicitor for respondents : *J. R. Howard Roberts, Solicitor to the London County Council.*

(1) 1 E. & E. 248.
(2) 24 Times L. R. 89.
(3) 23 Times L. R. 240.

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McMANUS *v.* BOWES AND OTHERS.

[1933. M. 3281.]

Public Authority—Asylum—Assistant medical officer—Appointment by visiting committee—No term as to notice—Dismissal with three months' notice—Power of visiting committee to dismiss without notice—Action for wrongful dismissal—Superannuation allowance—Action for return of contributions—Lapse of more than six months—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 276*—Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1*—Asylums Officers' Superannuation Act,* 1909 (9 *Edw.* 7, *c.* 48), *ss.* 10, 15.

By s. 276, sub-s. 1, of the Lunacy Act, 1890: " The visiting "committee of every asylum shall appoint . . . . (*b*) a medical "officer . . . . (*f*) such other officers and servants as they think "fit. . . . ."

Sub-s. 3: " The committee may remove any person appointed "under this section. . . . ."

In 1923 a doctor was appointed by the visiting committee of an asylum as assistant medical officer in the asylum. On October 21, 1927, the doctor was dismissed by the committee with three months' notice. He was at the same time suspended from his duties and given three months' salary. The doctor put forward a claim for a superannuation allowance under s. 10 of the Asylums Officers' Superannuation Act, 1909. On November 9, 1930, the Minister of Health, to whom the matter was referred under s. 15, gave a decision adverse to the doctor's claim. On October 20, 1933, the doctor brought an action, against (inter alia) the visiting committee, for wrongful dismissal and for return of his superannuation allowance contributions:—

Held, by Greer, Slesser and MacKinnon L.JJ., that the plaintiff's claim both for wrongful dismissal and also for the return of his contributions was barred by the Public Authorities Protection Act, 1893, as the dismissal was an act done, and the neglect to pay the contributions was the neglect of an act done, " in pursuance, "or execution . . . . of any Act of Parliament " and the action was not brought within six months of such act or neglect.

Held further, by Slesser and MacKinnon L.JJ. (Greer L.J. dissenting), that the power given by s. 276 of the Lunacy Act, 1890, to the visiting committee to remove any officer appointed under that section must be construed as a power to remove at pleasure, and that any limitation of that power contained in any agreement made with an individual officer would, to that extent, be ultra vires.

Per Greer L.J. that s. 276 of the Lunacy Act, 1890, gave the visiting committee of an asylum power to make agreements with the officers and servants whom they appointed upon such terms as were necessary in order to obtain the services of such officers and servants.

Decision of Macnaghten J. affirmed.

APPEAL from a decision of Macnaghten J.

The plaintiff, Hugh Charles McManus, was a registered medical practitioner and a Bachelor of Medicine and a Bachelor of Surgery of Victoria (Manchester) and Liverpool Universities.

The defendants were Dr. R. F. B. Bowes, who was until October 21, 1927, the medical superintendent of the Park Prewett Mental Hospital (a hospital provided and maintained by the Hampshire Joint Mental Hospitals Visiting Committee); H. Spooner, the clerk of the Park Prewett Mental Hospital, who was sued on his own behalf and on behalf of the Visiting Committee of the Park Prewett Mental Hospital (which was a sub-committee appointed by the Hampshire Joint Mental Hospitals Visiting Committee for the purpose of dealing with the Park Prewett Mental Hospital, which was situated near Basingstoke); F. V. Barber, the clerk to the Hampshire Joint Mental Hospital Visiting Committee, who was sued on his own behalf and on behalf of the Hampshire Joint Mental Hospitals Visiting Committee; and various members, including the Duke of Wellington, of the above-mentioned committees.

The plaintiff in 1904 had been assistant medical officer, and during 1905 senior resident medical officer, at Bagthorpe Infirmary. From June 14, 1906, until August 31, 1922, he was assistant medical officer to the Lancaster County Medical Hospital; but from May 31, 1915, until October 28, 1919, he was seconded for service with His Majesty's military forces, and during part of that time he acted as mental specialist to the British Expeditionary Army in Russia. The termination of his service with the Lancaster Visiting Committee was due to some dispute, and he was dismissed by a three months' notice, which was part of the terms of his employment there.

The plaintiff was in May, 1923, orally engaged by the defendant Dr. Bowes as second assistant medical officer of the Park Prewett Mental Hospital as from June 1, 1923, at a salary of 400*l.* per annum with emoluments valued at 150*l.* per annum. This appointment was confirmed by the Park Prewett Visiting Committee on June 14, 1923. In 1925 his salary was raised from 400*l.* to 425*l.*, and in August, 1926, he was appointed pathologist to the hospital at an additional salary of 75*l.*, making his total salary 500*l.* a year. At the time of the plaintiff's engagement by Dr. Bowes no mention was made as to the notice upon which the engagement of the plaintiff might be terminated and the minute of the committee confirming the appointment was also silent on the subject.

Dr. Bowes himself had been appointed medical superintendent of the asylum in July, 1919, and the terms of his engagement provided that his employment might be deter-"mined by a three months' notice on either side.

In October, 1927, the position of affairs at the hospital was extremely unsatisfactory, the relations between the plaintiff and Dr. Bowes, the medical superintendent, having become very strained. The Park Prewett Hospital Visiting Committee entrusted the duty of dealing with the situation to a sub-committee, of which the Duke of Wellington was chairman.

On October 20 the plaintiff wrote to the Duke of Wellington " to ask if you will grant me the privilege of a private interview "at an early date. I have communicated my wish to Dr. Bowes "and he agrees."

On October 21 the sub-committee called upon the plaintiff to attend before them. When the plaintiff attended before the committee the Duke of Wellington told him that he could not hear a communication private to himself but that the sub-committee was ready to hear anything that he might wish to say to them with regard to himself or with regard to the affairs of the hospital. The plaintiff declined that invitation. The sub-committee thereupon came to the conclusion that the interests of the hospital required that the plaintiff should no longer be in their service, and the clerk to the committee by their instructions, on October 21, 1927, wrote a letter to the plaintiff giving him three months' notice of termination of his services, and suspending him forthwith from his duties at the hospital, and requiring him to depart from the institution on the following day, October 22, 1927. A cheque for his salary up to date with full pay and emoluments for three months was enclosed. Pursuant to that letter the plaintiff left the Park Prewett Mental Hospital on October 22.

The plaintiff subsequently for some years was prosecuting a claim for a superannuation allowance. The question as to the right of the plaintiff to a superannuation allowance was ultimately, in accordance with s. 15 of the Asylums Officers' Superannuation Act, 1909, referred to the Minister of Health, and on November 9, 1930, the Minister of Health gave his decision adverse to the plaintiff's claim.

On October 20, 1933, the plaintiff issued his writ in the present action. By his statement of claim, which was delivered on November 21, 1933, the plaintiff claimed against each of the defendants jointly or, alternatively, severally, damages for conspiracy, damages for libel, damages for slander, damages for negligence, and damages for conversion of certain property. He claimed against the defendant committees jointly or, alternatively, severally, a declaration that he had never been validly dismissed and that his employment had never been validly determined; he claimed an order for payment of arrears of salary and emoluments which he alleged were due to him; further or alternatively, damages for wrongful dismissal; further or alternatively, damages for breach of contract; further or alternatively, a declaration that the defendants were bound to pay him a superannuation allowance under the Asylums Officers' Superannuation Act, 1909; an order for payment of the amount of the allowance that was due to him; further or alternatively, a declaration that the defendants were bound to repay to him the aggregate amount of his contributions under that Act and an order for the payment to him of the amount so due. He also claimed against the first-named defendant, Dr. Bowes, damages for wrongfully procuring or inducing the defendant committees or one of them to commit breaches of contract with the plaintiff.

The case was tried before Macnaghten J. and a special jury. After the trial had proceeded for three days Serjeant Sullivan, who was then appearing for the plaintiff, withdrew from the consideration of the jury all the claims alleged in the statement of claim except the claim for damages for wrongful dismissal and the claim for the repayment of contributions which the plaintiff had made under the Asylums Officers' Superannuation Act, 1909.

With the consent of counsel Macnaghten J. discharged the jury which had heard for three days the various claims which the plaintiff had withdrawn, with a view to the trial by a fresh jury of the issue whether the plaintiff was wrongfully dismissed. On the day fixed for the trial of that issue the plaintiff was unfortunately ill and could not give evidence on his own behalf. In those circumstances Macnaghten J. thought it would be convenient to have the question argued before him whether in law the plaintiff was entitled to any notice at all, which depended on the true construction of s. 276 of the Lunacy Act, 1890, the defendants' contention being that that section gave them power to remove any person appointed under that section at their pleasure, and that they could without assigning any reason remove any person from the office to which he had been appointed; and also whether the plaintiff was entitled to repayment of the contributions which the plaintiff had made under the Asylums Officers' Superannuation Act, 1909.

Macnaghten J. held that he was bound by the decision of McCardie J. in *Brown* v. *Dagenham Urban District Council* (1) to hold that the plaintiff was employed upon the terms that the visiting committee might remove him at their pleasure, and that he could have no claim against them if they dismissed him without notice, and that therefore the plaintiff's claim for damages for wrongful dismissal must be dismissed. He also held that the plaintiff was not entitled under s. 10 of the Asylums Officers' Superannuation Act, 1909, to receive back the deductions which the visiting joint committee had made in respect of contributions to a superannuation allowance, inasmuch as the plaintiff was also claiming by his action that he was entitled to a superannuation allowance.

The plaintiff appealed.

Pritt K.C. and *Gerald Gardiner* for the appellant. The decision of the judge, in accordance with the defendants' contention

(1) [1929] 1 K. B. 737.

that the defendant committees were entitled under s. 276 of the Lunacy Act, 1890, to dismiss the plaintiff without notice, was wrong. It is clear that the visiting committee of the asylum under that section must appoint certain officers and may appoint others. The plaintiff does not come within the description of officers whom the visiting committee must, under s. 276, sub-s. 1 (*a*), (*b*), (*c*), (*d*) and (*e*), appoint. He comes within sub-s. 1 (*f*), which provides that the visiting committee shall appoint " Such other officers and servants as they think "fit." By sub-s. 3 the committee " may remove any person "appointed under this section, and if the office of chaplain, "medical officer, superintendent, clerk or treasurer becomes "vacant "—the plaintiff did not hold any one of these offices —" the committee shall appoint a person to fill the vacancy "subject to the restrictions affecting the original appointment, "and they may in their discretion fill any vacancies among "other officers and servants of the asylum." By sub-s. 5 " the salaries, wages and remuneration of every person appointed under this section shall be fixed by the committee." Sect. 276 merely authorized the making of these appointments. It does not prescribe the conditions under which the officers shall hold their offices ; it remains for the visiting committee to make contracts with the candidate for office, and to prescribe the conditions thereof. The learned judge construed the words in sub-s. 3 " may remove " as meaning " may "remove at will, pleasure, or discretion." If this provision was not in the section the visiting committee would have no power to discharge an officer ; once appointed he would hold his office for life. It is clear that the word " remove " is required merely to authorize the discharge of an officer. Before 1924 the registrar of a county court under s. 25 of the County Courts Act, 1888, was appointed by the county court judge subject to the approval of the Lord Chancellor, but the county court judge had no power to remove him. The power to remove a registrar was given by s. 27 of the County Courts Act, 1888, to the Lord Chancellor or the Chancellor of the Duchy of Lancaster (as the case might be) when either of them " shall in his discretion think fit." A power must be given by statute to appoint an officer and a power must likewise be given by statute to remove him. Sect. 276 of the Lunacy Act, 1890, merely authorizes the appointment and removal of the officers therein mentioned, but it does not prescribe the conditions of the contract of service made with them.

In *Nelson* v. *James Nelson & Sons, Ld.* (1), the articles of association of a limited liability company provided that the board of directors might appoint a managing director for such period as they deemed fit, and might "revoke" the appointment. Scrutton J. held that the articles did not empower the board to revoke the appointment at will, but for good cause only. The decision was upheld in the Court of Appeal (2), but not for the same reasons. Certain Acts of Parliament expressly provide that certain officers shall hold office during the pleasure of the local authority. Under s. 103, sub-s. 3, of the Local Government Act, 1933, a county medical officer of health holds office "during the "pleasure of the county council" so however that he shall not be dismissed from his office without the consent of the Minister. See also s. 106, sub-s. 2, of the same Act. Under s. 148, sub-s. 1, of the Education Act, 1921, a local authority may appoint necessary officers, including teachers, to hold office "during the pleasure of the authority." Sect. 189 of the Public Health Act, 1875, also states in terms that certain officers "shall be removable by the urban authority at their "pleasure." In *Brown* v. *Dagenham Urban District Council* (3), upon which case Macnaghten J. relied as an authority in the present case, McCardie J. held that inasmuch as a local authority had power under s. 189 of the Public Health Act, 1875, to remove their clerk from his office at pleasure and without cause or notice, that power could not be negatived or impaired by a provision in any contract of service entered into between the parties as to notice to be given to terminate the employment. But that case does not apply here, because the section in that case provided that the officer "shall be

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(1) [1913] 2 K. B. 471.
(2) [1914] 2 K. B. 770.
(3) [1929] 1 K. B. 737.

"removable by the urban authority at their pleasure" which words are absent in s. 276 of the Lunacy Act, 1890. As a result of that decision s. 121 of the Local Government Act, 1933, was passed, making provision for notice of termination of, and retirement from, such appointments held during pleasure. Therefore where a statute provided for an officer to hold office "at pleasure" it was thought necessary to make provision requiring the giving of a proper notice before such employment could be terminated. But where the statute giving the power to appoint or remove an officer does not contain the words "at will," "at discretion," "at pleasure," there is no necessity for such a statutory provision as is to be found in s. 121 of the Local Government Act, 1933. In such a case the appointing authority can make a contract containing such terms as they think fit; the section merely authorizing the appointment or removal of the officer.

If the plaintiff was entitled to reasonable notice before he was discharged, and did not receive such notice, his claim for damages for breach of contract of service is not barred, as the defendants contend, by s. 1 of the Public Authorities Protection Act, 1893. The limitation contained in that section has never been applied to an action for damages for breach of contract. The act complained of was not done "in pursuance, or execution, or intended execution of any Act "of Parliament, or of any public duty or authority, or in "respect of any alleged neglect or default in the execution of "any such Act, duty or authority." See *Bradford Corporation* v. *Myers* (1); *Clark* v. *Lewisham District Council* (2); and *Sharpington* v. *Fulham Guardians*. (3) In *Lyles* v. *Southend-on-Sea Corporation* (4) Vaughan Williams L.J. expressed the view that the protection afforded by the Public Authorities Protection Act, 1893, "only applies to duties and acts which "the person is under a statutory obligation to perform or do." In *Milford Docks Co.* v. *Milford Haven Urban District Council* (5) A. L. Smith M.R. said: "one has only to look at the real

(1) [1916] 1 A. C. 242.
(2) (1902) 19 Times L. R. 62.
(3) [1904] 2 Ch. 449.
(4) [1905] 2 K. B. 1, 13.
(5) (1901) 65 J. P. 483, 484.

"action as brought upon the contract to see that it is "not within" the Public Authorities Protection Act, 1893. Romer L.J. said: "The Public Authorities Protection Act, "1893, does not apply to actions for the price of goods sold "and delivered and for work and labour done. That is obvious "if s. 1 is looked at. What was the only act complained of in "this case? The non-payment of money. How can it be "said that such non-payment was an act done in pursuance "or execution or intended execution of any Act of Parliament, "or of any public duty or authority, or an alleged neglect or "default in the execution of any such act, duty or authority?"

If the defendants raise any defence under s. 16 of the Mental Treatment Act, 1930, it will be contended on behalf of the plaintiff that he was removed from his office by persons acting "in bad faith or without reasonable care"—a matter to be decided by the jury.

The plaintiff also claims the return of his superannuation contributions under s. 10, sub-s. 1, of the Asylums Officers' Superannuation Act, 1909. The plaintiff was an established officer within the meaning of s. 1, sub-s. 1, of that Act. Macnaghten J. held that inasmuch as the plaintiff had put forward a claim for a superannuation allowance he could not also claim the return of his superannuation contributions. The plaintiff, however, was entitled to claim a superannuation allowance or in the alternative a return of his superannuation contributions. The only substantial question before the Court is whether the plaintiff is entitled to recover all his superannuation contributions or only those paid whilst he was in the service of the defendant committee. The right to the superannuation contributions arose as soon as the Minister of Health dismissed the plaintiff's claim to a superannuation allowance on November 9, 1930, which was less than six years and more than six months from the issue of the writ in the action. The Public Authorities Protection Act, 1893, does not apply to this claim. There was no neglect here of a public duty; *Bradford Corporation* v. *Myers*. (1) If there was a neglect of a public duty there was a continuance of

(1) [1916] 1 A. C. 242.

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injury or damage up to the date of the writ. The plaintiff, however, is not suing for a default, but in debt; and *Bradford Corporation* v. *Myers* (1); *Clark* v. *Lewisham Urban Council* (2); and *Milford Docks Co.* v. *Milford Haven Urban District Council* (3) show that the Public Authorities Protection Act, 1893, is not applicable to the present case. Lord Buckmaster L.C. said in *Bradford Corporation* v. *Myers* (4): "In other "words, it is not because the act out of which an action arises "is within their power that a public authority enjoy the "benefit of the statute. It is because the act is one which is "either an act in the direct execution of a statute, or in the "discharge of a public duty, or the exercise of a public authority. "I regard these latter words as meaning a duty owed to all the "public alike or an authority exercised impartially with regard "to all the public. It assumes that there are duties and "authorities which are not public, and that in the exercise "or discharge of such duties or authorities the protection does "not apply." That dictum directly applies here. In *Bennett* v. *Stepney Borough Council* (5) the plaintiff, the servant of a borough council, brought an action to recover superannuation contributions paid under a scheme established under a private Act of Parliament. Ridley and Lush JJ. held that the defendants, the borough council, were protected by the Public Authorities Protection Act, 1893. That decision was wrong and ought not to be followed. The Public Authorities Protection Act, 1893, has nothing to do with a claim for debt due to the plaintiff.

Assuming that the defendant committee have broken their contract by dismissing the plaintiff without notice, that breach was wrongfully procured by Dr. Bowes and the plaintiff was accordingly entitled to damages as against him. (6)

(1) [1916] 1 A. C. 242.

(2) 19 Times L. R. 62.

(3) 65 J. P. 483.

(4) [1916] 1 A. C. 247.

(5) (1912) 107 L. T. 383.

(6) The Court at the conclusion of the reading of the evidence held that there was no evidence that Dr. Bowes had knowingly and wilfully procured a breach of contract by the defendant committee by the wrongful dismissal of the plaintiff, assuming that there was a breach of contract by the defendant committee, and the plaintiff's appeal was accordingly dismissed as against Dr. Bowes.

F. J. Tucker K.C. and *W. E. Lloyd* for the respondent Dr. Bowes.

Croom-Johnson K.C. and *W. Blake Odgers* for the respondents, the Visiting Committee of the Park Prewett Mental Hospital. Every local authority is bound under s. 238 of the Lunacy Act, 1890, to provide and maintain an asylum or asylums for the accommodation of pauper lunatics. Sect. 239 provides that a local authority shall exercise the powers conferred by that Act for providing asylum accommodation by a visiting committee. By s. 276, sub-s. 1, the visiting committee of every asylum shall appoint various officers, including (*a*) a chaplain, (*b*) a medical officer, (*c*) a superintendent of the asylum, (*d*) a clerk, (*e*) a treasurer, and "(*f*) Such other officers "and servants as they think fit." The plaintiff came within the last category. Express power is given to the visiting committee under sub-s. 3 of s. 276 to "remove any person "appointed under this section." The committee is bound to fill a vacancy in the office of chaplain, medical officer, superintendent, clerk or treasurer, but they were given a discretion as to filling vacancies among other officers and servants of the asylum. There is no distinction between saying that an officer is appointed during the pleasure of the committee and saying that an officer may be removed by the committee. The committee had no power to enter into any contract with any of their officers and servants except on the terms stated in s. 276. The power to remove an officer or servant which is contained in sub-s. 3 of s. 276 must be read into any contract entered into between the committee and their officers. That power is express and unlimited and the committee cannot by contract deprive itself of the power of removal. No contract was entered into between the visiting committee and the plaintiff in the present case, and the Court cannot infer that any particular notice should be given previous to dismissing him. Sect. 121 of the Local Government Act, 1933, which requires notice before the termination of appointments held during pleasure, does not apply to officers appointed under the Lunacy Act, and therefore does not apply in the present case. The decision of McCardie J. in *Brown* v. *Dagenham Urban District Council* (1) was correct. He there held that under s. 189 of the Public Health Act, 1875, an urban district council had power to remove their clerk from his office at pleasure and without cause or notice, and that this power cannot be negatived or impaired by any provision as to notice to be given to terminate the employment in any contract of service entered into between the parties. In that case the clerk to the local authority had been appointed assistant overseer, and McCardie J. also held that s. 5, sub-s. 1, of the Local Government Act, 1894, conferred on the local authority power to revoke the appointment of an assistant overseer at will and without cause, notice or hearing. Under s. 7 of the Poor Relief Act, 1819 (59 Geo. 3, c, 12), the inhabitants of any parish in vestry assembled were empowered to nominate and elect assistant overseers of the poor of such parish, "and every person or persons so "appointed shall continue to be an assistant overseer of the "poor until he or they shall resign such office, or until his "or their appointment shall be revoked by the inhabitants "of the parish in vestry assembled, and no longer." The words "shall be revoked" were held by McCardie J. in *Brown* v. *Dagenham Urban District Council* (1) to give the local authority power to remove the assistant overseer at will. The word "remove" in s. 276 of the Lunacy Act, 1890, has the same effect. It was held in *Reg.* v. *Carpenter* (2) that an assistant overseer of a parish was to be deemed the servant of the inhabitants of the parish, and might be so described in an indictment for embezzling money collected by him for the poor rate. It was held in *Reg.* v. *Governors of Darlington School* (3) that the governors of a grammar school might, under the terms of their charter of foundation, at their discretion remove a master without summons or hearing, and although no charge had been brought against him, and that the governors had no right to limit the discretion given to them by the charter by making by-laws that no master should thereafter be removed unless some sufficient cause of complaint should be exhibited in writing against him. In an Irish case, *M'Guigan* v. *Belfast Guardians* (1), where art. 41 of the General Regulations made under the Poor Law Acts provided that "Every officer appointed to "or holding any office under these Regulations shall continue "to hold the same until he die or resign, or be removed by the "Commissioners, and every porter or assistant may be dismissed "by the Board of Guardians without the consent of the "Commissioners," it was held, in the case of an assistant schoolmaster, that the Guardians had an absolute power of dismissal vested in them in respect of assistant officers, which power they could exercise without any previous notice to the person to be dismissed. That case was followed by Lord Alverstone C.J. in *Lloyd* v. *Bermondsey Guardians* (2), when he held that poor law guardians had an absolute power to dismiss a workhouse matron without notice. It was held in *In re Teather and Poor Law Commissioners* (3) that a relieving officer who was deemed unfit for his office could be removed by the Poor Law Commissioners without giving him notice of their intention to remove him. It may be that the plaintiff could have left his employment without giving notice; on the other hand it may be that he had to give notice before he could leave his employment, but that the committee were under no obligation to give him notice. It would be difficult to imply a term that one party to a contract of service should have to give notice before terminating the employment, but that the other party to the contract could not be required to give notice. The cases relied upon by the appellant turn upon the County Courts Act and the Companies Act, which are very different from the Lunacy Act.

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(1) [1929] 1 K. B. 737.

(2) (1866) 35 L. J. (M. C.) 169.

(3) (1844) 6 Q. B. 682.

The Public Authorities Protection Act, 1893, s. 1, affords a protection to the defendants against the plaintiff's claim. The defendant committee have discharged an officer whom they were obliged to appoint under the Lunacy Act, 1890,

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(1) (1885) 18 L. R. Ir. 89.
(2) (1912) 77 J. P. 72.
(3) (1850) 19 L. J. (M. C.) 70.

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and have removed him under powers conferred by the same Act. It may be that if a local authority make a voluntary contract with a person, being one which the authority is not bound to make at all, the Public Authorities Protection Act, 1893, will not apply to protect the local authority. But where, as in the present case, there is a statutory obligation upon the authority to enter into the contract and there is some default in carrying out that contract, the Public Authorities Protection Act, 1893, affords a complete answer to a claim based upon such default. The distinction between a voluntary contract and one into which the authority is under a statutory obligation to enter was pointed out by the House of Lords in *Bradford Corporation* v. *Myers* (1), where the House "held "that the act done was not done ' in pursuance, or execution, " ' or intended execution of any Act of Parliament, or of any " ' public duty or authority ' within the meaning of s. 1 of the "Act, but was done in the carrying out of a private contract "which they were not bound to enter into "—see per Lush J. in *Edwards* v. *Metropolitan Water Board.* (2) Bankes L.J. in the same case said (3): "I think it is clear from that "case "—*Bradford Corporation* v. *Myers* (1)—" that a public "body does not necessarily enjoy the protection of the statute "merely because it is acting under a leave or licence conferred "upon it or under a permission granted to it by an Act of "Parliament. To entitle it to protection it is necessary that "it should be acting in pursuance or execution or intended "execution of an Act of Parliament or of a public duty or "authority." The point was taken in *Lyles* v. *Southend-on-Sea Corporation* (4) that the protection afforded by the Public Authorities Protection Act, 1893, applied only to actions of tort and that that action arose out of contract, inasmuch as the duty of carrying a passenger safely was not imposed by Parliament, but arose out of a contract with the passenger. But it was held that the plaintiff's cause of action did not depend on contract, but arose out of a breach of the duty to carry the plaintiff safely cast upon the defendant corporation by the fact of his being taken as a passenger, and that breach of duty was a "neglect or default" in the execution of a public duty within the meaning of s. 1 of the Public Authorities Protection Act, 1893. *Bennett* v. *Stepney Borough Council* (1) was rightly decided and is an authority that is applicable in the present case.

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(1) [1916] 1 A. C. 242.
(2) [1922] 1 K. B. 291, 295.
(3) [1922] 1 K. B. 300.
(4) [1905] 2 K. B. 1.

Gerald Gardiner in reply. The omission to pay a sum of money is not a neglect or default in the execution of any Act of Parliament within s. 1 of the Public Authorities Protection Act, 1893. *Bennett* v. *Stepney Borough Council* (1) is the only case against the appellant's contention. The words "neglect or default in the execution of any such "Act" are not apt words to apply to the omission to do anything. Romer L.J. in *Milford Docks Co.* v. *Milford Haven District Council* (2) pointed out that non-payment of money was not an act done in pursuance, or execution or intended execution of any Act of Parliament, or of any public duty or authority, or an alleged neglect or default in the execution of any such Act, duty or authority. The plaintiff's claim or demand for these superannuation contributions would have come within s. 1 of the Poor Law (Payment of Debts) Act, 1859 (22 & 23 Vict. c. 49), and would therefore have been subject to the limitation imposed by that section; but that Act has been repealed by s. 2 of the Public Authorities Protection Act, 1893. This is a continuing cause of action, and therefore this is not a proceeding to which the Act of 1893 applies. The last employer is liable to make payment of the whole of the contributions made under the Asylums Officers' Superannuation Act, 1909, including not only the contributions paid to the defendant committee but also the contributions paid to other employers. There was no compulsion upon the defendant visiting committee under s. 276 of the Lunacy Act, 1890, to appoint any officers except the five specifically mentioned; therefore as there was no statutory duty to appoint the plaintiff to his post of assistant medical officer of this asylum the Public Authorities Protection Act,

(1) 107 L. T. 383.

(2) 65 J. P. 483, 484.

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1893, does not apply to protect the defendant committee in respect of the plaintiff's wrongful dismissal. With regard to the meaning of the word "remove" the cases dealing with assistant overseers do not afford any assistance, as they depend on the language of the particular statutes in question. The two cases of *M'Guigan* v. *Belfast Guardians* (1) and *Lloyd* v. *Bermondsey Guardians* (2) were both authorities upon the power given to guardians to dismiss minor officials, but neither of those cases afforded any assistance as to the meaning of the word "remove" in s. 276 of the Lunacy Act, 1890. *Reg.* v. *Governors of Darlington School* (3) and *In re Teather and Poor Law Commissioners* (4) were merely examples of the principle that, if a discretion is given, that discretion must not be fettered. A mere power to remove does not carry with it a right to remove without notice. It was held in *Sharpington* v. *Fulham Guardians* (5) that the plaintiff's claim was in respect of a private duty arising out of a contract, and not for any negligence in performing a statutory or public duty, and that therefore the Public Authorities Protection Act, 1893, did not apply. Equally it does not apply to a claim arising out of a wrongful dismissal.

Greer L.J. This is an appeal by the plaintiff, Dr. McManus, who was employed as an assistant medical officer of the Park Prewett Mental Hospital at the material times, to have judgment in the appeal or an order for a new trial. The plaintiff was from June 14, 1906, to August 31, 1922, assistant medical officer to the Lancaster County Mental Hospital under an agreement under which he was entitled to three months' notice. He received his three months' notice, and his service terminated on August 31, 1922. After some temporary employment in connection with matters relating to lunacy or insanity, he obtained, on May 1, 1923, an appointment by the defendant committee as second assistant medical officer to Park Prewett Mental Hospital. There was no express agreement

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(1) 18 L. R. Ir. 89.
(2) 77 J. P. 72.
(3) 6 Q. B. 682.
(4) 19 L. J. (M. C.) 70.
(5) [1904] 2 Ch. 449.

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as to the notice to which he was entitled, and, therefore, unless the long argument which was addressed to us by Mr. Croom-Johnson is right, he would be entitled on an implied agreement to a reasonable notice. He, in fact, was appointed by the committee in whom were vested the powers conferred by the Lunacy Act, 1890, for providing and maintaining the asylum. He was appointed on May 1, 1923, at a salary of 400*l.*, with emoluments which were valued at 150*l.*, consisting of board and lodging. On August 12, 1926, he was appointed pathologist to the asylum at an additional salary of 100*l.* per annum. On October 21, 1927, the plaintiff was orally dismissed by the committee who, contrary to his contention, were willing to hear anything that he had to say; but, in consequence of his refusal, no representations were made by him to the committee, because he preferred to say what he had to say to the chairman of the committee, the Duke of Wellington. On the same date, October 21, 1927, written notice was given to him purporting to be in accordance with his contract, on the assumption that three months was an appropriate period of notice. At the same time the committee suspended him for the time being from his duties, and gave him three months' salary, a course that they were entitled to take if three months' notice was a proper notice to be given in the circumstances of the case; but there being no express agreement as to notice, under the law which is applicable to cases of this sort, he was entitled to a reasonable notice, and it would be for the jury, if the case were tried by a jury, to decide what a reasonable notice was. Owing to some difficulty with reference to the continuance of the hearing of the case, the question as to what was a reasonable notice was never determined. The learned judge, however, came to the conclusion that he had adequate material to dispose of the case without any finding by the jury as to what was the period of reasonable notice. Macnaghten J. gave his decision on the two questions which arose for decision, the first question being whether or not the plaintiff's dismissal having taken place so long ago as October 21, 1927, and his claim for a superannuation allowance having been decided against him by the Minister of Health on November 9, 1930, more than a period of six months before he brought his action, the plaintiff's action was precluded by the Public Authorities Protection Act. The learned judge decided that part of the case on the ground that the statute applied. With regard to the other part of the case, that was concerned with a claim which the plaintiff made in the alternative to be paid the sums due to him in respect of his contributions to the superannuation fund, this second claim can be disposed of quite simply, because admittedly it was a claim that could be made, and could only be made, under the provisions of the Asylums Officers' Superannuation Act of 1909, and inasmuch as it could only be made under the statute the failure to pay was a neglect of the duties imposed by the statute, and, therefore, the statutory period having elapsed, he could not make any claim. It was that part of the case that the learned judge decided on a ground that does not appeal to me as correct—namely, on the ground that inasmuch as the plaintiff had put forward the alternative claim to be paid the full amount of his pension, he could not also claim the return of the amount of his contributions. That seems to me to be quite wrong, because the plaintiff is entitled to put his claims in the alternative, and he did claim in the alternative that, if he was not entitled to his superannuation allowance, he was at least entitled to the return of his contributions.

In order to decide this case it is necessary to examine some of the sections of the Lunacy Act, 1890, and especially s. 276. I should add that the asylum is never the property of the committee. They are not the occupiers of the asylum. An asylum in many cases belongs to one local authority who are the occupiers, and in this particular case it was an asylum which belonged to two combined local authorities, and it was necessary, in order that the business of the asylum should be carried on, that some body should be appointed to manage the asylum, and the statute provides that that is to be done by a committee called the visiting committee. Sect. 276 provides: " (1.) The visiting committee of every asylum shall "appoint . . . . (*b*) A medical officer, who shall reside in the

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"asylum and shall not be the clerk or treasurer of the asylum; "(c) A superintendent of the asylum, or, if there is more than "one division, a superintendent of each division of the asylum, "who shall be the resident medical officer or one of the resident "medical officers of the asylum, or of the division of which he "is appointed superintendent, unless a Secretary of State "authorise the committee to appoint some other person than a "medical officer to be superintendent; (*d*) A clerk; (*e*) A "treasurer; (*f*) Such other officers and servants as they think "fit." It was contended by Mr. Croom-Johnson that that merely meant that the visiting committee were to nominate the various officers and servants referred to in the section, but did not confer upon them any power to make any agreement whatever with those officers and servants so appointed. To my mind that is an impossible argument, and it is not an argument that has ever appealed to these authorities, because they invariably make agreements, and in the instance which we have from Lancashire they had made an agreement for three months, and there is an agreement with Mr. Bowes for a three months' notice. It would not be possible for the business of the hospital to be carried on if the visiting committee had not power when they nominated an officer also to agree the terms on which he was to carry out his duties. I read s. 276 as meaning that they are to have the power, which they would not have if it was not given to them by the statute, to appoint officers on such terms as they find it necessary to agree to in order to obtain the officers and servants that they are bound to have in order that the asylum can be carried on; but I do not think that that is a matter of any very great importance, because in making the agreement, just as in nominating the officer, they were acting under the provisions of the Act of Parliament; they had no power to do it except under the Act of Parliament, and the agreement that they made was an agreement that they made under the powers given to them by the statute in s. 276, and, if they broke that agreement, then they were doing something contrary to the powers which had been entrusted to them under the Act of Parliament, and they can take advantage of the provisions of the Public Authorities Protection Act, 1893, as if they had made no agreement at all. Then sub-s. 3 of s. 276 provides: "The committee may remove any person "appointed under this section," and then it goes on to deal with the chaplain, medical officer, superintendent, clerk and treasurer. It is unnecessary to read that part; but it was contended by Mr. Croom-Johnson that "remove" in that sub-section meant remove at their pleasure, as and when, in their discretion, they thought fit. I think that it means nothing of the sort. Our attention has been called to several instances in which officers were appointed when it was expressly stipulated under the statute which appointed them that they were appointed at pleasure. I need not refer to them more in detail. One of them was under one of the Public Health Acts, and another under the Education Act, and in other cases, such as the *Dagenham* case (1), which was tried by McCardie J., the words were "may revoke." There is no such word here. "Revoke" means to nullify the agreement that has been made, and where the word is "revoke" I think that it would be right to say that, if the question arose as to whether that entitles the authority to revoke at pleasure, it does so entitle them, because "revoke" by its very meaning means put an end to an agreement which is in existence; but in this case the word is "remove," and there are not any words which make it necessary to put the interpretation upon it of "remove at will" or "at pleasure," which they did not in this case purport to do at all. The reason why the provision as to removing any person appointed under the section is contained in s. 276 is that the power must be given to somebody to make the agreement, and the power must be given to somebody to put an end to the agreement under the terms of the agreement, and the section is required in order to give the power, to appoint a man to begin his office and to determine the office, to the visiting committee, who otherwise might have been left with the difficulty that although they might appoint, they were not the authority by statute to remove in accordance with the agreement that they had made.

(1) [1929] 1 K. B. 737.

For these reasons I think that the appeal ought to be dismissed, because the words of s. 1 of the Public Authorities Protection Act, 1893, apply to the case. That section provides: "Where . . . . any action, prosecution, or other "proceeding is commenced in the United Kingdom against "any person for any act done in pursuance, or execution, or "intended execution of any Act of Parliament, or of any public "duty or authority, or in respect of any alleged neglect or "default in the execution of any such Act, duty, or authority, "the following provisions shall have effect: (*a*) The action, "prosecution, or proceeding shall not lie or be instituted unless "it is commenced within six months next after the act, neglect, "or default complained of." If inadequate notice was given to the plaintiff, that seems to me to be a neglect or default in intended execution of an Act of Parliament. For these reasons, without referring definitely to any other authorities, I think it is quite clear that in this case the appeal fails on the ground that the period provided for by the Public Authorities Protection Act, 1893, had expired. In giving judgment I have not said anything about the action against Dr. Bowes, because I thought that I had sufficiently dealt with it at an earlier stage in the case; but I want to repeat that, in my judgment, there was no evidence which would justify us in finding that Dr. Bowes had procured the wrongful dismissal (if it was wrongful) knowingly and wilfully intending to procure a breach of contract.

Slesser L.J. This case is a difficult one and it raises two different subjects for consideration, first, a question of general application, namely, the meaning of s. 276 of the Lunacy Act, 1890, and secondly, the question of the application of the Public Authorities Protection Act, 1893, to this particular case. It is convenient to approach the question by dealing with the Lunacy Act first. In my opinion, though I say it with great hesitation, the word "remove" in s. 276, which is the section which we have here to consider, means remove at will, at pleasure or at discretion. The actual section, to which my Lord has already referred, provides for the powers of the visiting committee of every asylum with regard first, to the appointment to certain offices, one of which is a medical officer, and secondly, the removal of persons appointed under that section. Then it goes on to deal with other appointments beyond those which appear to be compulsory upon the visiting committee. It says: "The "visiting committee of every asylum shall appoint . . . .: A "medical officer, who shall reside in the asylum" and so on, and then there follows (*f*): "Such other officers and servants "as they think fit." It has been pointed out to us here that the plaintiff, Mr. McManus, was not the medical officer, but was a deputy medical officer. The medical officer was Dr. Bowes. He is one of those persons who may be appointed; but I do not draw any distinction in principle between the obligation compulsorily to appoint the medical officer and the optional power to appoint such other officers as they think fit. As I have said, sub-s. 3 provides for the removal of persons appointed under the section. It says: "The committee may remove any person appointed under "this section." Then it says that if certain offices fall vacant "the committee shall appoint a person to fill the vacancy," and other vacancies they may fill in their discretion. Therefore, there is a power to appoint and a power to remove. The question which arises, and it is a very important question on this part of the case, is whether, when a local authority or a visiting committee, which exercise the powers of a local authority, have made a contract, either for an express period or for a period of a reasonable term to be implied, their power to remove authorizes them to get rid of a person appointed under s. 276 notwithstanding the fact that they have in their contract purported to give him a contract of a certain duration. As my Lord has pointed out, the power to make these contracts at all is given them by the section, and if the words "may "remove" are properly to be construed as "may remove at "pleasure," it would follow that any limitation on their power to terminate the contract in the individual agreement made with the particular officer would, to that extent, in so far as it was a fetter on their power to remove, be ultra vires. I think that that is the view which was taken by McCardie J. in *Brown* v. *Dagenham Urban District Council.* (1) There two matters fell for consideration : first, the effect of s. 189 of the Public Health Act, 1875, and secondly, the effect of s. 5, sub-s. 1, of the Local Government Act, 1894. So far as regards the Act of 1875 no question really arose. The power was that of an urban district council to remove their clerk from his office at pleasure and without cause or notice. The other section, namely, s. 5, sub-s. 1, of the Local Government Act, 1894, conferred on the local authority power to revoke the appointment of an assistant overseer at will and without cause, notice or hearing. By s. 5, sub-s. 1, of the 1894 Act it was enacted : ". . . . the power of appointing and revoking "the appointment of an Assistant Overseer, for every rural "parish having a parish council, shall be transferred to and "vested in the parish council," so that the parish council had the same powers with regard to the appointment and revocation of the appointment of an assistant overseer as were formerly held by the authorities from whom the power was transferred. The power in question was conferred by the Poor Relief Act, 1819 (59 Geo. 3, c. 12), and under that Act, which dealt with the appointment of assistant overseers which made it lawful by s. 7 for the inhabitants of any parish in vestry assembled to nominate and elect a discreet person or persons to be assistant overseer or overseers of the parish, it was further provided : " Every person or persons so appointed shall continue to be "an assistant overseer of the poor until he or they shall resign "such office or until his or their appointment shall be revoked "by the inhabitants of the parish in vestry assembled, and no "longer." Those words, in the opinion of McCardie J., and I agree with him, were apt to give power to the local authority, whichever authority might, at the moment, be exercising the power, to remove the assistant overseer at will. He held office during pleasure, and there are a number of old authorities to which it is not necessary to refer and text-books which support that view. In many of the statutes the words " remove at "will" have been specifically inserted. I have already referred to s. 189 of the Public Health Act of 1875, which states in terms that certain officers "shall be removable by the urban authority "at their pleasure." Apart from the addition of the words "at their pleasure" those words are not distinguishable from the present ones, the words "shall be removable" being clearly stated. It is also to be found that in the Local Government Act of 1933, which to a large extent codifies and consolidates the existing legislation, it is provided by s. 106: "The council "of every borough shall appoint fit persons to be" and then follow a number of offices, including the medical officer of health. Then in sub-s. 2 it is provided that "every such officer "shall hold office during the pleasure of the council." With regard to county medical officers of health, by s. 103 it is provided in sub-s. 1: "Every county council shall appoint one "or more fit persons to be county medical officer or officers of "health" at such salary as they may determine. Then it is provided in sub-s. 3: "A county medical officer of health "shall not be appointed for a limited period only but shall hold "office during the pleasure of the county council." That section and the other section, to which I have referred, seem to me to contemplate that it is within the power of the local authority to make contracts with their officers dealing with all subject-matter other than that which is expressly limited by the language of the Act. Thus it is said in sub-s. 4: "A county "medical officer of health shall perform such duties as may be "prescribed," and that the county medical officer of health shall be paid such reasonable salary as the county council may determine. All these matters may be the subject of contract, but it being expressly provided that, subject to the consent of the Minister, he shall hold office during the pleasure of the county council, a term of a contract which provided a duration to the contract which would conflict with the power of the county council to appoint during pleasure would be ultra vires. Therefore I see no difficulty in assuming that even where an officer may be removed and may be removed at pleasure, if the two things mean the same thing in the context, nevertheless it would be competent for the local authority, in all matters not specifically dealt with in which

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(1) [1929] 1 K. B. 737.

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their powers were limited, to make such agreement as they thought fit, and I am unable to understand the argument of Mr. Croom-Johnson that those words, as I understood him, make it incompetent for the local authority to make any contract with its officers.

Another example to the same effect is to be found in the Education Act of 1921, where it is provided by s. 148, sub-s. 1: " A local education authority may appoint necessary officers, "including teachers, to hold office during the pleasure of the "authority, and may assign to them such salaries or remunera-"tion (if any) as they think fit, and may remove any of those "officers." That section I find instructive, in this sense, that unlike some of the other sections which speak specifically of removal with some qualification or revocation, that section first says that they are to hold office during the pleasure of the authority and then goes on to say " and may remove "any of those officers," which seems to indicate to my mind that the Legislature thought that the power of removal was a necessary consequence of the power to hold office during pleasure. Two of these sections are in slightly different language, and one comes back to the original problem, whether the words here mean " remove at pleasure," although the words " at pleasure " are not specifically mentioned.

For myself, I find very little assistance from the cases which depend upon the interpretation of the articles of association of a limited liability company, which have been cited to us, except one passage which I read from the judgment of Kennedy L.J. in *Nelson* v. *James Nelson & Sons, Ld.* (1) He is speaking of the phrase " revoke an appointment " which, with every respect, I think means in this sense nothing other than " remove." Kennedy L.J. says (2): " The word "' revoke '"—and I would add, the word " remove "—" must be "read with its context. ' Revoke an appointment ' means, no "doubt, to put an end to an appointment, but not necessarily "to put an end to it without giving any notice where, for "example, by the terms of the agreement it is provided that "notice shall be given." I understand the learned Lord Justice

(1) [1914] 2 K. B. 770. (2) Ibid. 777.

there to be saying that where, in a series of articles forming the constitution of a limited company, one finds other articles inconsistent with giving that general application to the word "revoke," one has to have regard to the context; but here I find, in the language of s. 276 of the Lunacy Act, no such language. I am not, therefore, precluded from giving to the word "remove" what I believe to be, in contradistinction to the word "appoint," its natural meaning, which is, as I see it, to remove at pleasure or remove at will. I think that those words "at pleasure," "at will" and the like, are surplusage in this connection and appear to be used in the Education Act without any specific qualification.

I would add a few words on one other argument which Mr. Pritt addressed to us on this point. He indicated that there were statutes in which the power of removal was vested in somebody other than the person having the power of appointment. He instanced s. 27 of the County Courts Act of 1888, which provides: "It shall be lawful for the Lord Chancellor, or "the chancellor of the duchy of Lancaster (as the case may be) "when such Lord Chancellor or chancellor of the duchy shall "in his discretion think fit, to remove the registrar of any court "from his office." He pointed out that by s. 25 the appointment of the registrar is vested in the county court judge, subject to the approval of the Lord Chancellor, there being, therefore, one authority which appoints and another which removes. For myself, I am unable to see how this helps his argument. We are to consider the meaning of the word "remove" and if it be a fact, as I think it is, that under s. 27 the Lord Chancellor may remove the registrar at pleasure, the mere fact that he is not himself the appointing authority does not, in my mind, put any gloss or qualification on the absolute power to remove. The same observation I would make with regard to any other statute, where the appointing authority and the removing authority are not the same.

I, therefore, start with the assumption that the word "remove" in s. 276 of the Lunacy Act, which we have here to consider, means to remove at pleasure, and that, therefore, any term of a contract which purports to give to an officer any

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duration of his contract inconsistent with that power is outside the ambit of the statute. If that be so, there is an end of the case, so far as regards Dr. McManus's claim against this local authority for wrongful dismissal. I agree with my Lord that, when the resolutions and the notices sent to Dr. McManus are considered, it is clear from the letter of October 21, 1927, in which Mr. Spooner, the Clerk to the Committee, said: "I am instructed by the special sub-committee . . . . to "give you three months' notice of termination of your services ". . . . I am further instructed to give you notice of suspen"sion", that in fact in this case the visiting committee did purport to give to Dr. McManus three months' notice, and did not exercise the right which they had to dismiss him at their pleasure by removing him; but that would not in itself disentitle Dr. McManus, if it were the right view, to come to this Court and say: "I dispute that three months is the proper "notice. True it is that I may have received three months' "notice, but I am entitled to have it found by a jury what, "from the consideration of my employment, is a reasonable "notice." The fact that his superior, Dr. Bowes, was receiving remuneration and that his contract was on the basis of a three months' notice, and the fact that Dr. McManus himself had, in a previous occupation at the Lancaster Asylum, received three months' notice, would not, in my view, be conclusive of the matter; in other words, had I come to the conclusion that Dr. McManus was entitled to notice at all and had not a contract holding office during pleasure, then I should have thought that the matter would have to be considered on a new trial, but for the reasons that I have stated I think that such an argument does not lie in his mouth at all.

The second point on this part of the case arises under the Public Authorities Protection Act, and I think it is necessarily involved in a decision of the first point. Had Dr. McManus, in fact, been employed under a contract of the kind which has been discussed in some of the cases dealing with the protection of public authorities, such as *Bradford Corporation* v. *Myers* (1), it would have followed, I think,

(1) [1916] 1 A. C. 242.

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that the local authority could not have invoked the protection of the statute against him. As Lord Buckmaster said in that case (1): " In other words, it is not because the act out of which "an action arises is within their power that a public authority "enjoy the benefit of the statute. It is because the act is one "which is either an act in the direct execution of a statute, "or in the discharge of a public duty, or the exercise of a public "authority." If the only connection between the employment of Dr. McManus and the statute had been that the local authority would have to point to the statute as an enabling statute to give them power to make contracts with doctors on such terms as they thought fit then I think that it might well be argued that, this being an act which is not only within their power, but in which they are free to make such contracts as they think fit, the case would be like the sale of the coal products in *Bradford Corporation* v. *Myers* (2), and the Public Authorities Protection Act would not apply. Similarly, in *Sharpington* v. *Fulham Guardians* (3), where a local authority had power to build houses for the reception of the destitute, it was held that a building contract made under that power was not in itself an act done in pursuance, or execution, or intended execution of an Act of Parliament, and that the Public Authorities Protection Act did not apply. If the true view be that this appointment and removal are directly statutory, not by reason of any contract, but by reason of the operative language of the section itself, as I think is the case with such an office as this, where the officer holds office during pleasure, then I think that it follows that such a case is not a contract of the voluntary nature suggested in *Bradford Corporation* v. *Myers* (2), or in *Sharpington's* case (3), or in several cases which are there discussed, but is a direct execution of the statute itself. Therefore I think that also for that reason—although it is more particular in its application to Dr. McManus than the more general view which I formed of the statutes affecting all officers appointed under s. 276—this appeal fails.

It follows that I must say something about the plaintiff's

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(1) [1916] 1 A. C. 247.
(2) Ibid. 242.
(3) [1904] 2 Ch. 449.

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claim under the Asylums Officers' Superannuation Act of 1909. I agree with my Lord in differing from the view expressed by the learned judge that this doctor could not claim effectually for a return of his contribution while he had upon the pleadings a claim for the pension. The fact is that in 1930, by a decision of the Minister of Health, it was finally determined that he was not entitled to his pension, and from that moment, as I see it, if he were entitled, he came under s. 10 of the Asylums Officers' Superannuation Act of 1909, which is to this effect: "(1.) An established officer . . . . who has not become "entitled to a superannuation allowance . . . . shall be "entitled to receive the aggregate amount of his contributions "under this Act." As from the moment when it had been finally and conclusively determined that he was not entitled to a superannuation allowance, which decision took effect as from the time of the decision of the Minister of Health, he did thereafter become entitled to the return of his contributions, and in my view the neglect to pay those contributions, to which I will assume that he was otherwise entitled, was a neglect within the language of the sections of the Public Authorities Protection Act, 1893, coming directly within the words the neglect of an " act done in pursuance, or execution . . . . of "any Act of Parliament," namely, a neglect to do that which the Act requires the local authority to do, that is to say, to return his contributions. Therefore that claim also is barred by reason of the Public Authorities Protection Act.

In these circumstances I do not think that it is necessary to consider in this case the difficult question whether, had he been validly entitled to ask for the recovery of the aggregate amount of his contributions, he could recover from this authority only the contributions which had been paid to that authority, or whether he would be entitled to aggregate all his contributions as against any particular authority. In my view, having regard to the operation of the Public Authorities Protection Act, that difficult problem does not arise for solution in the present case.

I would only add that I agree with my Lord, respectfully, that in the case of Dr. Bowes, against whom the action is

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brought on the *Lumley* v. *Gye* (1) principle, that he procured the breach of contract between the local authority and Dr. McManus, the first answer is that there is not a contract the breach of which he could procure, because although in my view there is a contract as to certain matters, the duration of the contract being at pleasure, and the procurement being the breach of that term that they should continue to employ him, it follows that there could not be a procurement of the breach of a contract when no contract as to the duration of his service existed. Secondly, even if there were, there is not a shadow of evidence in this case that he ever did procure any such breach of contract at all. The evidence which has been read to us, and carefully considered, consists in the most part of complaints made by him about certain sisters and nurses, and discussions with Dr. Bowes, his superior; but as to any specific evidence of any procurement of the whole or any member of this visiting committee to terminate this alleged contract there is none whatever, and that part of the case, I agree for the reasons stated by the learned judge in the Court below, must necessarily fail.

It follows, therefore, that the whole appeal must be dismissed with costs. I have given judgment at some length in this case because I realize that the earlier part of my judgment, namely, the construction of the meaning of the word " remove " is of importance, affecting not only Dr. McManus, but the whole class of persons holding office under the visiting committee under the Lunacy Act.

MacKinnon L.J. I agree that this appeal must be dismissed. It would indeed be lamentable if we were constrained to come to any other conclusion, so as to lead to further stages in this litigation. The engagement of the plaintiff as assistant medical officer came to an end on October 21, 1927. Five years and 364 days elapsed, and on October 20, 1933, he issued his writ against Dr. Bowes, his late medical superintendent, against a number of the members of the committee that was administering the hospital, and against the clerk of that committee. He asserted against these various defendants personally five causes of action, including damages for conspiracy, for libel, for slander, for negligence, and for wrongful conversion. Against the defendant committee he alleged nine causes of action, and the whole statement of claim covered 17 pages, and included 45 paragraphs. Of that series of claims almost all were abandoned by his experienced counsel at the trial, and there remain now, and have been brought before us, only three very minor claims. The first is the claim that he was wrongfully dismissed and was not given the appropriate period of notice. He was, in fact, given three months' notice, and he says that he ought to have had a longer notice. That has never been determined by a jury. Secondly, he claims the return of his superannuation allowance contributions; and thirdly, there is a claim against Dr. Bowes for procuring a breach of contract by the committee. That last claim, in the course of the reading of the evidence, was dismissed, as we were satisfied that there was not a rag of evidence against Dr. Bowes supporting it.

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(1) (1853) 2 E. & B. 216.

As regards the claim for the return of his contribution payments, his right, if it ever arose, arose on November 9, 1930, when the Ministry of Health decided against his appeal for the granting of a superannuation allowance. I am satisfied that under the Public Authorities Protection Act, 1893, any claim for the return of his superannuation allowance contributions ought to have been made within six months of that date, November 9, 1930. No claim was made until October 20, 1933. To that claim, therefore, the Public Authorities Protection Act is a complete defence.

There remains only the question whether the plaintiff has been wrongly deprived of the right of having decided by a jury the question whether the three months, which he had himself agreed was the proper period when he was engaged in Lancashire, and which was the time agreed by his superior officer, Dr. Bowes, in his own agreement, was a sufficient period, or whether he ought to have had a longer notice. In regard to that, I agree that this appeal fails. As to this, I think that the section of the Lunacy Act by which the committee were given power to appoint him and to remove him from his appointment gave them, in effect, power to put an end to his employment at pleasure. I can see no real difference between the words "to revoke his appointment" and the words "remove him from his office." Quite apart from the mere words themselves, I think that the result of the three cases of *Brown* v. *Dagenham Urban District Council* (1), in the decision of which I agree with McCardie J.'s view; *Reg.* v. *Darlington School Governors* (2); and *In re Teather* (3), go to show that the meaning of these various phrases used in different Acts is really the same, and that where under s. 276 of the Lunacy Act of 1890 it is provided that the committee may remove any person appointed under this section, that is the same as a power to revoke his appointment, and it really amounts to a provision that he is employed at the pleasure of the committee. I further think that the action of the committee in revoking his appointment, or removing him from his office, or putting an end to his employment, was an act done in purported execution of their powers under the Lunacy Act, and that, therefore, the right of action, if any, in respect of that action on their part must be exercised within the six months provided by the Public Authorities Protection Act and cannot be exercised five years and 364 days after the act complained of.

The result is that I am entirely in agreement with the proposition that this appeal must be dismissed with costs.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitor for plaintiff, appellant: *William P. Webb.*

Solicitors for defendant Dr. Bowes: *Beamish, Hanson, Airy & Co., for Shenton, Pain & Brown, Winchester.*

Solicitors for the other defendants: *Robbins, Olivey & Lake, for F. V. Barber, Winchester.*

(1) [1929] 1 K. B. 737.
(2) 6 Q. B. 682.
(3) 19 L. J. (M. C.) 70.

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[1936. M. 893.]

Factories and workshops—Dangerous machinery—Fencing—Duty of employers to provide and maintain efficient guards—Duty of person employed to use and maintain guards provided—Guard provided by employer—Order to person employed not to use guard—Injury to person employed—Right of employee to maintain action—Liability of employers—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 79—*Woodworking Machinery Regulations*, 1922 (*St. R. & O.* 1922, *No.* 1196).

The Factory and Workshop Act, 1901, provided in s. 10, sub-s. 1 (*e*), that " all dangerous parts of the machinery . . . . "must . . . . be securely fenced. . . . ."

Sect. 79 gave the Secretary of State power to make regulations for the safety of persons employed in dangerous trades.

The Woodworking Machinery Regulations, 1922, made in pursuance of s. 79, imposed upon the occupier of a woodworking factory an obligation (Regulation 17) to provide when practicable the cutter of every vertical spindle moulding machine with the most efficient guard, and (Regulation 21) to maintain the guards required by those Regulations in an efficient state, which must be constantly kept in position while the machinery is in motion.

The Regulations also imposed a duty upon every person employed on a woodworking machine (Regulation 23) to use and maintain in proper adjustment the guards provided in accordance with the Regulations.

In the defendants' woodworking factory there was a spindle moulding machine in which the circular saw was protected by a pair of fences when the machine was being used for grooving a straight piece of wood, but which had to be removed when the machine was being used for grooving curved wood. A factory inspector visited the factory and required the defendants to provide a proper guard for curved work. This was done, but the guards had to be constantly changed according as the machine was being used for straight work or for curved work. The defendants' managing director gave an order to the plaintiff, who was working the machine, not to use the guard, because it was a waste of time. In consequence the plaintiff did not use the guard, with the result that his hand came in contact with the saw and he was injured. The plaintiff, who was under twenty-one years of age, received certain weekly payments under the Workmen's Compensation Act, 1925. Subsequently he commenced an action at common law to recover damages for his personal injuries, alleging that the defendants had been guilty of a statutory breach of duty in failing to fence the machine. Hilbery J. held that he could not recover, as he had himself committed a breach of statutory duty imposed upon him by

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Regulation 23 of the Woodworking Machinery Regulations in failing to use and maintain the guard. On appeal:—

Held, reversing the decision of Hilbery J., that there was not a guard provided by the employers within the meaning of Regulation 23 of the Woodworking Machinery Regulations, 1922, and that therefore the plaintiff was not committing a breach of statutory duty in failing to use and maintain a guard provided in accordance with the Regulations. It was true that there was a guard upon the premises near where the plaintiff was working, but he had been told by his employers not to use it. When the plaintiff was ordered not to use the guard, it had been taken away, just as much as if it had not been provided at all.

Held, further, that the plaintiff, being an infant, was not bound by the fact that he had accepted weekly payments under the Workmen's Compensation Act, 1925, as it was more to his benefit to bring an action at common law in order to recover damages for his personal injuries than to make a claim for compensation under the Act of 1925.

Stephens v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225, applied and followed.

Per Greer L.J.: The case ought also to be decided in favour of the plaintiff upon the ground that a man cannot take advantage of his own wrong. The defendants were not entitled to take advantage of the order they had given to the plaintiff not to use the guard, whereby they had prevented him from performing his duty under Regulation 23.

APPEAL from a decision of Hilbery J.

The plaintiff, Samuel Edward Murray, a young man nineteen years of age, brought the action by his next friend to recover damages for personal injuries sustained by him on November 14, 1935, while working in the defendants' woodworking factory where he was employed. On the day in question the plaintiff was at work on a spindle moulding machine when his hand slipped from the wood which he was pressing against the teeth of a rotating saw, and in consequence the little finger of the right hand and the ring finger came in contact with the revolving saw, with the result that there was complete amputation of the little finger and amputation of all but the stump of the ring finger.

The spindle moulding machine at which the plaintiff was working worked a circular saw in the horizontal plane. The circular saw revolved horizontally immediately above the surface of the table upon which any piece of wood which it was desired to groove was placed. When the machine was being used for grooving a straight piece of wood there was affixed to the table a pair of fences, and those presented a flat and vertical surface of metal on either side of and close up to the revolving saw. If, however, the machine was being used for curved work those two fences had to be removed.

In May, 1935, the factory inspector visited the factory and called attention to this machine and required the provision of a proper guard. The defendant company's managing director, Mr. Schwachman, who had been a practical woodworker in his early life, had never heard of a guard for spindle moulding machines, and he regarded the guard as being unnecessary ; but in obedience to the factory inspector's orders he purchased and provided a guard. The guard was a heavy casting which had to be bolted on to the machine at the back of the saw, and there was a visor of metal which when dropped into position would permit the work to be done but would screen the worker's hands from the teeth of the saw. When straight woodwork was being worked upon the machine only the two straight fences could be used. For curved work the two straight fences had to be removed and the guard had to be fitted, with the result that the worker had to be constantly shifting the fences, and that took up extra time.

After a time the plaintiff received a direction or order from Mr. Schwachman not to use the guard because it was a waste of time. Mr. Schwachman added, " It is there if any one "comes in." In consequence the plaintiff did not use the guard, with the result that he received the injuries mentioned above.

The defendants admitted liability for payment of compensation under the Workmen's Compensation Act, 1925, and the plaintiff received weekly payments of 30*s.* down to January 30, 1936, when the defendants gave notice of their intention to terminate the plaintiff's weekly compensation.

The plaintiff then commenced the present action at common law alleging that the defendants had been guilty of a statutory breach of duty in failing to guard or fence the machine.

The Factory and Workshop Act, 1901, s. 10, provided in sub-s. 1 : " With respect to the fencing of machinery in a

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"factory the following provisions shall have effect: . . . . (c) All "dangerous parts of the machinery . . . . must either be "securely fenced, or be in such position or of such construction "as to be equally safe to every person employed or working in "the factory as it would be if it were securely fenced."

Sect. 79 gave the Secretary of State power to make regulations for the safety of persons employed in dangerous trades.

The Secretary of State, in pursuance of s. 79, on November 2, 1922, made the Woodworking Machinery Regulations, 1922 (St. R. & O. 1922, No. 1196), which provided that "It shall "be the duty of the occupier to observe Part I. of these "Regulations.

"It shall be the duty of all persons employed to observe "Part II. of these Regulations."

"PART I.

"*Duties of Occupiers.*

17. "The cutter of every vertical spindle moulding machine "shall when practicable be provided with the most efficient "guard having regard to the nature of the work which is being "performed."

21. "The guards and other appliances required by these "Regulations shall be maintained in an efficient state and shall "be constantly kept in position while the machinery is in "motion, except when, owing to the nature of the work being "done, the use of the guards or appliances is rendered "impracticable. The guards shall be so adjusted as to enable "the work to be carried on without unnecessary risk."

"PART II.

"*Duties of persons employed.*

23. "Every person employed on a woodworking machine "shall—(i.) use and maintain in proper adjustment the guards "provided in accordance with these Regulations . . . . except "when owing to the nature of the work being done, the use of "the guards or appliances is rendered impracticable."

Hilbery J. held that the machine was a dangerous machine, and that there was no doubt that the accident was caused through the absence on the occasion in question of the guard,

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and that there had been a breach by the employers of their statutory duty; but Parliament had by Regulation 23 of the Woodworking Machinery Regulations, 1922, imposed an absolute duty on all persons employed on woodworking machines to use and maintain in proper adjustment the guard provided in accordance with those Regulations, and the plaintiff could not establish his cause of action against his employers without at the same time establishing a breach of the statutory duty imposed upon himself by Regulation 23. His failure to use and maintain the guard must necessarily be statutory negligence on his part and the cause of the accident, and therefore the plaintiff's claim must fail. If he were wrong in that view he assessed the damages at 750*l*.

The plaintiff appealed. The appeal was heard on February 19, 22 and 23, 1937.

Pritt K.C. and *David Weitzman* for the appellant. The decision of Hilbery J. was wrong. Under s. 10, sub-s. 1 (*c*), of the Factory and Workshop Act, 1901, a duty is imposed upon the occupier of a factory to securely fence all dangerous parts of machinery, and under sub-s. 1 (*d*) to maintain all fencing in an efficient state, and if a factory is not kept in conformity with the Act the occupier is liable to a fine. Sect. 140 provides that the person actually committing the offence for which the occupier is liable shall be liable to the like fine as if he were the occupier, but the occupier is also liable to a fine unless he has brought the actual offender to justice under s. 141. Sect. 79 gave the Secretary of State power to make regulations for the safety of persons employed in dangerous trades. The Secretary of State in pursuance of that section on November 2, 1922, made the Woodworking Machinery Regulations, 1922, which imposed a duty on the occupier of a woodworking factory to observe Part I. of the Regulations, and a duty on all persons employed to observe Part II. of the Regulations. The occupier is required under Regulation 17 in Part I. to provide the cutter of every vertical spindle moulding machine with an efficient guard, and under Regulation 21, also in Part I., to maintain the guard in an efficient state, which must be constantly kept in position while the machinery is in motion. Regulation 23, which is in Part II. of the Regulations, imposed an obligation upon every person employed on a woodworking machine to use and maintain in proper adjustment the guards provided in accordance with those Regulations. The fact that a workman does not comply with the Regulation by maintaining in proper adjustment the guards does not take away his cause of action if he is injured through the absence of the guards. The statute imposes a duty upon occupiers of factories to fence dangerous machinery and to make it safe, and it enforces that duty by sanctions. That statutory duty imposed upon employers gives a right of action to a workman who is injured through a breach of that duty. That duty exists independent of negligence. The duty of complying with the Regulations is laid upon the employer for the benefit of the workmen, but the duty of complying with the Regulations is laid upon the workman not for the benefit of the employer but for the benefit of himself and other workmen. There is no case in which it has been held that an employer who has committed a breach of statutory duty can escape liability to a workman who has been injured in consequence of that breach of duty merely because the workman has himself committed a breach of the obligation laid upon him. In the present case the effective cause of the accident was not the act of the workman in taking the guard off and leaving it off but the orders of the employer requiring the workman to take the guard off and to keep it off: see *Wheeler* v. *New Merton Board Mills, Ld.* (1)

The injury to the plaintiff was caused by the breach of statutory duty of the defendants without any contributory negligence on the part of the plaintiff, and the plaintiff has therefore a right at common law to recover damages for his injuries from the defendants: see *Groves* v. *Lord Wimborne* (2); *Dew* v. *United British Steamship Co.* (3); *Lochgelly Iron & Coal Co.* v. *M'Mullan* (4); *Flower* v.

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(1) [1933] 2 K. B. 669.
(2) [1898] 2 Q. B. 402.
(3) (1929) 98 L. J. (K. B.) 88.
(4) [1934] A. C. 1.

Ebbw Vale Steel, Iron & Coal Co. (1); *Craze* v. *Meyer-Dumore Bottlers' Equipment Co.* (2)

The defendants cannot rely by way of defence upon the contributory negligence of the plaintiff. Where there has been negligence on the part of the defendant and contributory negligence on the part of the plaintiff that party is liable who committed the last negligent act occasioning the accident. In the present case, even if the last act before the accident was that of the plaintiff in removing the guard from the machinery that act was done by the plaintiff in obedience to the improper order of the defendants, so that the cause of the accident was the defendants' breach of duty and not any contributory negligence on the part of the plaintiff. The case of *Dew* v. *United British Steamship Co.* (3), where it was held that the plaintiff's contributory negligence was a defence to his action against the defendants for breach of a statutory duty, is distinguishable from the present case, because here the accident was not due to the negligence of the plaintiff in using the machine, but solely to the improper order of the defendants requiring the plaintiff to do what he did, there having been no novus actus interveniens between the improper order of the defendants and the accident. In *Flower* v. *Ebbw Vale Steel, Iron & Coal Co.* (1) the decision of the Court of Appeal that the contributory negligence of the plaintiff was a defence to his action against the defendants for breach of statutory duty, was reversed by the House of Lords on the ground that there was no evidence to prove that the defendants had ever given the orders, the breach of which was said to amount to contributory negligence. See also the recent case of *Craze* v. *Meyer-Dumore Bottlers' Equipment Co.* (2)

To an action by a servant against his master for damages for breach by the master of a statutory duty to fence dangerous machinery in a factory, common employment of the plaintiff and a fellow servant whose act was the immediate occasion of the accident is no defence: *Groves* v. *Lord Wimborne.* (4)

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(1) [1934] 2 K. B. 132; [1936] A. C. 206.

(2) [1936] W. N. 217.

(3) 98 L. J. (K. B.) 88.

(4) [1898] 2 Q. B. 402.

The dictum of Vaughan Williams L.J. in that case (1) to the contrary effect is erroneous, and he can only have uttered it through having forgotten the statutory duty imposed upon the master.

Secondly, the plaintiff has not lost his right to recover damages from the defendants at common law by reason of his having received compensation under the Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84). That Act provides by s. 29, sub-s. 1: "When the injury was caused by the personal "negligence or wilful act of the employer or of some person for "whose act or default the employer is responsible, nothing in "this Act shall affect any civil liability of the employer, but in "that case the workman may, at his option, either claim compensation under this Act or take proceedings independently "of this Act; but the employer shall not be liable to pay "compensation . . . . both independently of and also under "this Act. . . . ." If the plaintiff had been of full age, the exercise by him of his option to take compensation under the Act would no doubt have prevented him from recovering damages in an action at common law; but, as he was an infant, his acceptance of compensation under the Act does not prevent him from recovering damages in an action at common law, if it is shown that the acceptance of compensation under the Act was not for his benefit. Here the plaintiff could recover a much larger amount of compensation in an action than under the Act, and it was clearly for his benefit to bring an action, and in these circumstances the fact that he has received compensation under the Act should be no bar to this action. That view was taken in *Stephens* v. *Dudbridge Ironworks Co., Ld.* (2), but the contrary view was taken in the later case of *Neale* v. *Electric and Ordnance Accessories Co., Ld.* (3) The law for the time being is usually taken to be that of the last effective decision, but the earlier of the two cases should be supported rather than the latter.

Maxwell Fyfe K.C. and *Marven Everett* for the defendants,

(1) [1898] 2 Q. B. 402, 418.
(2) [1904] 2 K. B. 225.
(3) [1906] 2 K. B. 558.

respondents. The defendants' case may be summarized in the following propositions :—

1. Although the claim is made under s. 10 of the Factory and Workshop Act, 1901, yet if the trade is scheduled as dangerous under s. 79, the Regulations thereunder must apply and constitute the duties of the employer and employed respectively.

2. It is an essential part of the framework of the Act that a duty is imposed upon a workman to look after his own safety.

3. The action for breach of a statutory duty cannot now be said to exist apart from negligence, since the House of Lords have held in *Lochgelly Iron & Coal Co.* v. *M'Mullan* (1) that a breach of a statutory duty causing damage is ipso facto negligence. If the conduct of an employer falls below the standard of reasonable care required by the Woodworking Machinery Regulations he is guilty of negligence.

4. Contributory negligence does not depend upon any breach of duty owing by the plaintiff to the negligent defendant, but upon the question whether the plaintiff could have avoided the consequences of the defendant's negligence.

5. The conduct of the plaintiff which is alleged to amount to contributory negligence need not be a cause intervening between the defendants' negligent act and the damage, but may operate at the same time as that act.

6. If the plaintiff has broken the Regulations, one of the causes of the accident has been his so falling below the statutory standard of care.

7. The plaintiff has been guilty of a criminal act in breaking the law which he must be taken to have known, and he and his employers are therefore co-participators in that criminal offence : see *Hillen* v. *I.C.I.* (*Alkali*), *Ld.* (2)

8. The ordinary rule that an act ordered or authorized by the defendant employer to be done does not constitute contributory negligence cannot help the plaintiff where there has been breach of a statutory duty on his part.

In order that the plaintiff may found his claim upon s. 10 of

(1) [1934] A. C. 1.

(2) [1934] 1 K. B. 455.

the Factory and Workshop Act, 1901, apart from the Regulations, he must prove that he was employed in a factory of which the defendant was the occupier, and that the machinery comes within the mischief of s. 10. The plaintiff relies upon s. 10, which imposes a duty to have dangerous machinery fenced, and the defendants rely upon the Regulations, which impose a duty upon the workman, as a defence. As soon as it is shown that a trade is a dangerous trade to which Regulations made under s. 79 apply the workman must comply with the duties imposed by the Regulations. The Regulations place a duty upon the workman to maintain the guards in proper adjustment, which duty he must carry out.

[GREENE L.J. The employer cannot be said to have provided a guard if he has prohibited its use.]

One has to look at the mischief at which the Regulations were aimed. That mischief was working a dangerous machine without a guard. If a guard has been provided by the employer it is immaterial that the employer tells the workman not to use it.

[GREENE L.J. The Regulations were not intended to penalize a workman who works a dangerous machine without a guard.]

The result of a stringent construction of the Regulations would probably be that the workman might lose his job, and that the employer might have to scrap the machinery. It was held by the House of Lords in *Lochgelly Iron & Coal Co.* v. *M'Mullan* (1) that a breach by an employer of a duty imposed upon him by statute to take a particular precaution for his servant's safety whereby the servant was injured constituted negligence on the part of the employer. *Rudd* v. *Elder Dempster & Co.* (2), to the contrary effect, was there disapproved. That disposes of the dicta in *Groves* v. *Lord Wimborne* (3), in which it is said that an action for breach of a statutory duty could exist apart from negligence. In order that a plaintiff should be defeated by a defence of contributory negligence it is not necessary that the plaintiff should be under a legal duty to take care for his own safety:

(1) [1934] A. C. 1, 9, 13, 18.
(2) [1933] 1 K. B. 566.
(3) [1898] 2 Q. B. 402, 412.

see Salmond on Torts, 9th ed., p. 473. Contributory negligence consists of some act on the part of the plaintiff which falls below the required standard of duty and which is the cause of the damage. The Regulations set up a standard of duty which has to be maintained. If there is a breach of that standard by the plaintiff it is necessary to see whether that breach was a contributory cause of the accident. The plaintiff might have said that he would not break the law and that he would stop work. The plaintiff fell short of the standard of care prescribed by the Regulations for his own safety and has in that way contributed to the accident. The guard was in the possession or control of the plaintiff, and he could therefore have used and maintained it in proper adjustment and so performed his statutory duty notwithstanding the order given to him by Mr. Schwachman. The prohibition by the employer to the workman to use the guard does not assist the plaintiff because it was an unlawful order. It was pointed out in *Moore & Co.* v. *Donnelly* (1) that a statutory prohibition cannot be made the subject of waiver or of informal modification, whereas a prohibition imposed by an employer can be waived or modified. The employer and workman were joining in a wrongful act—namely, the breach of the statute—and the workman knew the act was a wrongful act. A person who is committing an offence cannot recover against a co-partner in the criminal offence: *Hillen* v. *I.C.I.* (*Alkali*), *Ld.* (2) A workman who works a saw without a guard where a guard has been provided, but where the employer has prohibited its use, commits a criminal offence, and thereby provides to the employer a defence to an action for personal injuries arising from an accident due to breach of the statutory Regulations. If a guard has been provided and is not used, the workman is guilty of a breach of statutory duty. When an employer provides a guard for a dangerous machine and then takes it away again, or tells the workman to work the machine without using it, and the workman obeys him, they are both conspiring to disobey the statutory Regulations and are both

(1) [1921] 1 A. C. 329, 339, 343. (2) [1934] 1 K. B. 455, 466.

committing a criminal offence. If the plaintiff has been guilty of a breach of statutory Regulations or has been guilty of conspiracy, he cannot recover, because in order to do so he would have to set up his own wrong. The onus of proof is on him. With regard to election, if the plaintiff had been of full age he would have been taken to have elected to take compensation under the Workmen's Compensation Act when he received the first payment of compensation under that Act. The material time is when he agreed to receive compensation under that Act. His claim for compensation was admitted at once.

GREER L.J. This is a case in which the facts which gave rise to the action and the judgment in the action are unusual and possibly never likely to occur again. There was a claim by an infant plaintiff, through his next friend, for damages occasioned to him by the defendants' breach of the statutory obligation or duty imposed for the benefit of workmen of the class of which the plaintiff was one, and which had been broken by his employers. At the trial of the action the learned judge came to the conclusion that the plaintiff could not recover because he himself had broken another regulation which applied to him to the same effect as the obligation or duty that the defendant employers had failed to carry out.

Two points arise for decision in the present case, because assuming that we find that the decision that the learned judge came to was wrong, the employers, the respondents, are entitled to say that there is another question which would dispose of this appeal, and being respondents they are able to take advantage of that, though the learned judge did not decide it.

The facts of the case so far as material are very clearly stated by the learned judge in his judgment. The plaintiff worked on a spindle machine, and there was on that machine a circular saw, for which, when what may be described as straight work was being worked by the men working at the machine, the proper guards had been provided; but those guards were insufficient for the protection of the employees where the nature of

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the work was changed and a circular groove had to be made in the wood for the purpose, I suppose, ultimately of the manufacture of some kind of furniture. In these circumstances, the learned judge came to the conclusion that, though there was an undoubted breach of a statutory duty by the defendants, there was also a breach of a statutory duty on the part of the plaintiff, and that in considering whether the plaintiff could recover he was bound to give effect to the view that, though the defendants had failed to perform their statutory duty, the plaintiff himself contributed to the accident by his failure to perform a statutory duty.

I think this appeal should succeed on two grounds. It seems to me quite unnecessary to refer to the number of cases in which the question has arisen as to what is the real ground of liability where a statutory duty has not been performed by the person on whom that statutory duty is imposed. Whether it is a case of negligence, which admits of a defence of contributory negligence, or whether it is a case of breach of a duty imposed for the purpose of protecting workmen and not a case of negligence at all, need not be determined in this case.

What happened was this : the plaintiff was working at his spindle moulding machine, and when he was working on what I have called straight work adequate protection was provided by two guards, one on either side of and close up to the revolving saw ; but those guards had to be taken away when a circular groove had to be made in the wood, and then either the circular saw, which is dangerous machinery, was unfenced or it was necessary that some guard should be provided which would be a protection to the workman when this circular groove was being made by the workman. In May, 1935, the factory inspector advised or ordered that a guard should be provided which would be adequate protection when the second kind of work was being done, and when the guards appropriate to the first kind of work were taken away. The managing director of the respondents had a guard made and brought it on to the premises. For a short time it was in fact used by the plaintiff, who was quite familiar with the use of this guard, because he had used one in a previous employment. It consists of something that the learned judge conveniently calls a visor, that is to say, a guard which had to be let down and which would when in that position permit the work to be done, but would screen the worker's hands from the teeth of the saw. Having used the machine for some time, the plaintiff was expressly told by the defendants' managing director, a Mr. Schwachman, that he was not to use the guard, which was on the premises and which he had up to that time been using. I fail myself to see any good business reason why the guard should not have been used. It only meant the adequate organization and arrangement of the work which had to be carried on at this factory by seeing that the straight work was done for, say, an hour or two, and then that the curved work was begun and carried on for a little time. A definite order, however, was given by Mr. Schwachman that the guard was not to be used.

The question arises whether in these circumstances it can be said that the plaintiff was committing a breach of Regulation No. 23 which is in Part II. of the Woodworking Machinery Regulations, 1922, which is in these terms: " Every person employed on a woodworking machine "— this was a woodworking machine—" shall use and maintain "in proper adjustment the guards provided in accordance with "these Regulations." In order to see what are the duties of the employer, the occupier of the premises, one has to look at several regulations in Part I. of the Regulations. Regulation 2 in Part I. says: " Every shaft, wheel, pulley, "strap, band or other device within reach by which any part "of a woodworking machine receives its motion shall be "securely fenced." Then in Regulation 17 these words are used as binding upon the employer as to what he is to do: " The cutter of every vertical spindle moulding machine shall "when practicable be provided with the most efficient guard "having regard to the nature of the work which is being "performed," and Regulation 21 reads in this way with regard to the duty of the employer: " The guards and other "appliances required by these Regulations shall be maintained "in an efficient state and shall be constantly kept in position "while the machinery is in motion, except when, owing to the "nature of the work being done, the use of the guards or "appliances is rendered impracticable"—It has not been contended that the use of the guard was impracticable in the circumstances of this case—" The guards shall be so adjusted as "to enable the work to be carried on without unnecessary risk." Therefore what the employer has to do is to provide a properly adjusted guard so as to enable the work to be carried out without unnecessary risk, and then in order that there should be co-operation on the part of the workman once he has been provided with a properly adjusted guard, Regulation 23 comes into operation as stating the duty of the persons employed. " Every person employed on a woodworking machine "shall use and maintain in proper adjustment the guards pro- "vided in accordance with these Regulations . . . . except "when, owing to the nature of the work being done, the use of the "guards or appliances is rendered impracticable." There was a guard within the meaning of Regulation 23 provided by the employer at the material time, namely at the time when this man received his injuries. Undoubtedly there was a guard upon the premises near the place where the plaintiff was working, but the contention that the guard was in his custody or possession seems to me to be an impossible contention. It was the employers' guard upon the employers' premises, and after the plaintiff had received an order not to touch it or not to put it in position when he was doing the work in which there was a danger from which the guard was intended to protect him, it seems to me quite wrong to say that he was failing to maintain in proper adjustment a guard provided in accordance with the Regulations which I have mentioned already. It is not sufficient for the employer to say that there was a guard somewhere upon the premises in the neighbourhood where the work was being carried on, and that as he had ordered a guard to be there he had provided it within the meaning of the Regulation. I think he had just as much failed to provide a guard when he said it was not to be used as if he had taken it away altogether, and so taken it out of the reach of the employee. If that is right, then the learned judge was wrong in finding that there was a breach by the plaintiff of Regulation No. 23. On that ground, in my judgment, the learned judge's conclusion was wrong and ought to be reversed.

But I think there is another ground upon which this case ought to be decided in favour of the appellant. There is a well known principle that has been over and over again applied by courts of justice in this country that no man can take advantage of his own wrong, and the wrong that was done in this case of which the defendants desire to take advantage was the order which Mr. Schwachman gave that the guard was not to be used. He gave a wrongful order which he knew would be obeyed by his own employee, the plaintiff, and he wants to take advantage of that in order to enable him to say that Regulation 23 gives him a defence to this action. I think he cannot do it, because he is the author of his own liability. He is not entitled to take advantage of his own wrong in preventing his employee, the plaintiff, from performing the duties which conceivably, if I am wrong on the other point, he might be called upon to perform under Regulation No. 23.

I have dealt with this case without considering the numerous cases that have been cited to us with reference to what the nature of the liability is that is imposed on an employer, an occupier of a factory, by s. 10 of the Factory and Workshop Act, or by the Regulations imposing the duty upon him. Whether the nature of that liability is that the employer can be sued in an action for negligence in which contributory negligence is a sufficient answer, I think it is unnecessary to consider in this case. There has been, perhaps, some clearing up of the position by the Supreme Court and the House of Lords, but I have much sympathy with the view expressed by A. L. Smith L.J. in *Groves* v. *Lord Wimborne* (1) that the duty imposed upon the employer is an absolute duty, imposed by the statute, and that the reason why the plaintiff can say that he is entitled to damages, inasmuch as this absolute duty had not been performed, is that the duty is imposed upon the employer for the particular benefit of the employee who has been damaged by the failure of the employer to perform the duty; but, as I

(1) [1898] 2 Q. B. 402.

say, I think it is unnecessary to deal with that case, or with a number of other cases that have been cited before us.

For the reasons that I have indicated, I think the learned judge's conclusion cannot be supported; but I should like to say this about it: the question presented to him for his decision was a very difficult one, and the Court is greatly indebted to the very careful way in which the learned judge stated the facts, and his reasons for believing that the plaintiff was an honest witness when he said what he did about the orders that he had received, and also for having saved the need for a new trial by finding what damages should be awarded in case his judgment should be reversed.

Upon the other point it is quite clear from the case of *Stephens* v. *Dudbridge Ironworks Co.* (1) that if an infant plaintiff is put to an election whether he should choose to make a claim under the Workmen's Compensation Act or whether he should make a claim in damages at common law, the infant workman is only bound by the election that he makes if it is for his benefit. The learned judge did not find it necessary to decide that question; but I think Mr. Maxwell Fyfe was right in saying that the learned judge rather indicated a view favourable to the respondents with regard to that question. I take a different view. It seems to me that, having regard to the innumerable cases that have been decided and are collected in Butterworth's Workmen's Compensation Cases, that there is just as much risk in compensation cases of having to go through three Courts before finally obtaining a decision as there is in the case of a common law action. In the present case I agree with Mr. Maxwell Fyfe when he says that the time we have to consider whether the election was for the benefit of the plaintiff is the time when in fact the election was made—namely, when he first claimed and received compensation under the Workmen's Compensation Act; but if he had considered the position, and if he had been properly advised, I think the result would be that he would have been advised, whichever course he should take: "You are running "a risk of having to incur very considerable expense, but if

(1) [1904] 2 K. B. 225.

"you bring an action at common law you will have this advantage, that if you succeed you will have a lump sum payment "which will make it unnecessary for the applications that have "to be made from time to time by a man who is alleged to have "recovered sufficiently to start his work again, and whose lack of "earning capacity has ceased. You will be relieved of the "necessity of applying for a declaration of liability and coming "back when you find you cannot earn the wages each week "that you used to earn. You will be relieved of the risk "of making a leading case, to be reported in Butterworth's "Workmen's Compensation Cases, and you will dispose of the "matter once and for all." In my judgment it was to the disadvantage of the workman that he should elect to proceed under the Workmen's Compensation Act, and to prefer that to an action at common law, in which, if properly advised, he would be told that his chances of success were very considerable and his risks of failure were very small, and that on the whole it would be to his interest to bring an action at common law to get the whole matter decided once and for all rather than have to deal with a statute under which it might be necessary to make applications from time to time, to suffer diminution of his weekly payments, and to have to apply if he found afterwards that the very grievous injuries that he received justified him in saying: "I now no longer earn the wages that I used "to earn; I cannot earn anything like so much, and I ask "for a declaration of liability," or it may be: "I can earn, "say, 10*s.* a week, and I ask for an order for 5*s.* a week." That is an unfortunate position in which a plaintiff may be placed.

I think for these reasons that the election was not for his benefit, and, on the authority of *Stephens* v. *Dudbridge Ironworks Co.* (1), was not binding upon him, and therefore on that ground the respondents fail to satisfy me that they were entitled to succeed.

For these reasons I think the appeal should be allowed and judgment entered for the plaintiff for 750*l.* with costs here and below.

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(1) [1904] 2 K. B. 225.

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Slesser L.J. I am of the same opinion, and I can state my reasons for differing from the learned judge below shortly. There is in this case no question but that the plaintiff has suffered a serious injury through the loss of parts of his hand due to the absence of a guard on a spindle moulding machine used in a woodworking factory of which the defendants were at all material times the occupiers. There is, I think, no question on the evidence and on the finding of the learned judge that the occupiers committed a breach of the Woodworking Machinery Regulations, 1922, and particularly of Regulation 17, which provides that "the cutter of every "vertical spindle moulding machine shall when practicable be "provided with the most efficient guard having regard to the "nature of the work which is being performed." The learned judge says that the plaintiff established a breach of statutory duty by the employers, and the reason he says so is this: the evidence is that following upon a visit by a factory inspector, when he saw the machine without a guard, a guard of the right kind was made and prepared for use with this machine. Mr. Schwachman, the managing director of Schwachman, Ld., the defendants, when the plaintiff tried to use the guard said to him: "Do not use it, it is only a waste of time," to which he added the somewhat sinister addendum: "It is there if "any one comes in." That really is not in dispute. If the matter were to rest there, there can be no doubt that, inasmuch as the plaintiff's injury was due to a breach of statutory duty by the employers, the case would fall within the well known principles established by *Groves* v. *Lord Wimborne* (1), and damages could be recovered by the workman on the basis of a breach by the employers of a statutory duty. It was, however, said by way of defence, and this defence has found favour with the learned judge, that the true cause of the damage in this case was not the breach of statutory duty by the employers, but was the breach by the workman himself of a statutory duty imposed upon him by Regulation 23. The learned judge puts it thus in his judgment: "That, in my "view, must disable him in a court of law from succeeding. If

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(1) [1898] 2 Q. B. 402.

"breach of the statutory duty, that is the failure to use and "maintain the guard, is statutory negligence on the part of the "employer, where the very same Regulations imposed the same "statutory duty on the employee, his failure must necessarily be "statutory negligence on his part and the cause of the accident."

In my view, when Regulation 23 is properly considered and applied to the facts of this case, it is wrong to say that this workman was in breach of statutory duty. The regulation is as follows: " Every person employed on a woodworking machine "shall use and maintain in proper adjustment the guards provided in accordance with these Regulations." That is his sole obligation—to use and maintain in proper adjustment the guard provided in accordance with these Regulations. It is necessary, therefore, to look at the Regulations to see whether guards have been provided in accordance with the Regulations, the failure to use and maintain which in proper adjustment has caused it to be said that the plaintiff has broken the Regulations. Now the fact of the matter is this, that the Regulations required of the employer in Part I., by Regulations 17 and 21, that the cutter of every spindle moulding machine shall be provided with an efficient guard, and that the guards and other appliances required by these Regulations shall be maintained in an efficient state. Of that we know nothing, and we will assume that they were in an efficient state; but Regulation 21 goes on: " And shall be constantly kept in position while the machinery "is in motion, except when, owing to the nature of the work "being done, the use of the guards or appliances is rendered "impracticable." The evidence is that, so far from these guards being kept in position while the machinery is in motion, the very person on whom the obligation lay under Part I., namely, the employer, to keep the guards in position while the machinery is in motion, through his servant, the plaintiff, ordered him to take away the guards from the machinery while it was in motion, or prevented him from erecting them. Regulation 21 goes on: " The guards "shall be so adjusted as to enable the work to be carried on "without unnecessary risk." Now that is an obligation upon the employer, and in this case, so far from carrying out that

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obligation, he did not permit but forbade the adjusting of the guards at all, so that in my view there were no guards provided by the employer in accordance with these Regulations. There were guards provided in the sense that a guard had been made which the plaintiff had been forbidden to use; but it most certainly was not provided in accordance with the Regulations, it was not kept in position, it was not adjusted, and therefore the plaintiff could not fail to use and maintain in proper adjustment guards provided, when no such guards had been provided which he could use and maintain in proper adjustment, and it is the failure to realize that, I think, which has led the judge into the error of thinking that this plaintiff could properly here be said to have broken any statutory regulation.

That being so I find it unnecessary in this case—because the whole of the alleged breach of duty by the workman said to have caused the injury is based upon Regulation 23—to consider what to my mind is a difficult question—namely, whether the independent obligation imposed by s. 10 of the Factory and Workshop Act, 1901, can or cannot have read into it the provisions of Regulation 23. It is significant to observe that s. 10, which the judge also held here to have been broken by the employer, is not dealing with any specific dangerous machinery for which regulations have been made under s. 79, but speaks generally " with respect to the fencing "of machinery in a factory the following provisions shall have "effect," and then " (*c*) all dangerous parts of the machinery " . . . . must . . . . be securely fenced." On the facts of this case, and, I think, on the admissions in the pleadings, it would follow that this case fell as much within s. 10 as within Regulation 17 of the Woodworking Machinery Regulations. On that it has been pointed out to us by Mr. Pritt that there are special provisions in ss. 140 and 141 dealing with fines on the persons actually committing the offence for which the occupier is liable, and under s. 141, though the employer's liability still continues, yet there is power to the occupier to exempt himself from fine on the conviction of the actual offender, subject to this, that it has been made to appear to the inspector that the wrongful act has been committed without the consent, knowledge or connivance of the occupier. It is not necessary here to consider whether, if this case had been brought only under s. 10, these provisions do not at least indicate that where there has been connivance of the employer he could not exempt himself from criminal responsibility, and even although the workman was in default under the statute, having actually committed the offence within the meaning of s. 140—assuming that the workman himself is covered by s. 140 as well as the other employees of the employer—it might be that another argument might have been addressed to us by Mr. Pritt which we should have had to consider; but as this case is founded solely on the consideration of Regulation 23, I do not think it necessary to pass any opinion upon that point.

That therefore leaves open this one question in this case to which my Lord has referred—namely, whether this workman by receiving, as he apparently did, payments under the Workmen's Compensation Act, following upon a claim dated November 19, 1935, has put it out of his power now to claim damages under the common law. As has been pointed out, the authorities go to show that the exercise of an option in the case of an infant workman must be considered from the point of view of whether it is for his benefit or not, and if it is for his benefit that he should proceed by an action at common law, then he is not bound by the option. One has to consider, I think, upon this aspect the position as it would have presented itself at the time when the alleged election was made, and I think, speaking for myself, that when one has regard to the great limitations which are placed upon workmen under the Workmen's Compensation Act, principally that in no case can they recover damages, but only compensation, which compensation is limited to the extent and the period of their incapacity, so that if this man, for example, from the healing of the stumps of his fingers was once more able wholly or partly to work in his occupation and suffer no financial disability, it might well be said that no more compensation was liable to be paid, and when it is considered also that the amount of the compensation in any case is severely limited by the Workmen's

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Compensation Act, and when, thirdly, it is taken into consideration that under s. 29 if he proceeds first at common law he may ask the tribunal to assess the compensation under the Workmen's Compensation Act, even if he fails at common law, albeit, the tribunal may deduct from such compensation all or such part of the cost which in their judgment may have been caused by the plaintiff bringing an action at common law instead of proceeding under the Workmen's Compensation Act, and when we take into consideration the amount of injuries which have been suffered by this man—and it is not entirely easy to exclude from the point of view of the hypothetical counsel advising this man at the time of the election what one thinks the issue in the case really is—presenting itself to me merely as a question of the construction of one regulation, interesting as the discussion has been before us, I think that on all these grounds a competent counsel advising this client at the time of the election would or ought to be taken to have told him that he should take his risk and proceed at common law. If that be the right view, then it is clearly not for his benefit to elect to proceed under the Workmen's Compensation Act, and consequently I am of opinion that he is not bound by his election and might properly proceed in the present case.

For these reasons I agree that this appeal succeeds.

GREENE L.J. I agree that this appeal succeeds, and as to the second point I do not wish to add anything to what has already been said by the other members of the Court; but as we are differing from the learned judge I wish to state in a few words my reasons for thinking that the appeal must succeed in spite of the argument addressed to us which found favour with the learned judge on the first point.

That point lies in a very small compass. It is of this nature: it is conceded that the employers in this case were guilty of a breach of their statutory duty. It is said that the foundation of the action for damages arising from such a breach is negligence, and that the defence of contributory negligence can validly be set up. That latter proposition is one which, at any rate in this Court, we must take to be correct. It is said in the present case that the law has laid down a standard of duty towards himself for his own protection to which the employee is bound to conform, and that if he fails to conform to that standard he himself is guilty of statutory negligence, just in the same way as in a matter arising at common law a plaintiff may have been guilty of negligence which affords a good defence, in that he himself failed in the performance of that duty towards himself which lies upon an ordinary reasonable man.

The argument depends entirely on a certain construction of Regulation 23 of the Woodworking Machinery Regulations, 1922. Under that, " every person employed on a woodworking "machine shall use and maintain in proper adjustment the "guards provided in accordance with these Regulations." The matter of providing the guards under the Regulations is one which concerns the employer. There is no obligation on the employee to provide the guards. It is for the employer to provide them, and if and when they are so provided it is for the workman to use and maintain them in proper adjustment. It is conceded on the part of the respondents that if it had not been for the existence of that regulation no duty would have lain on the present appellant to use the guard in disobedience to the order prohibiting its use which the employer had given.

It is said, however, that on the true construction of Regulation 23 the guard was provided by the employer notwithstanding the fact that the employer had forbidden the workman to use it. That is a construction which I am quite unable to accept. It seems to me that the language of Regulation 23 is simple and intelligible. It creates a criminal offence in a workman who disobeys its provisions, and I should expect to find, and indeed on the true construction of this Regulation I do find, that the criminal offence which is created is one as to which there can be no doubt whether a workman has or has not committed it, because the matter is left in such a way that it is within his own volition whether he makes use of the thing provided or not. It is contemplating the case where the master, having performed his duty to provide and adjust the guard and then going away about his affairs, leaves the workman to perform his work, and the workman finding the guard there provided for him without anything to prevent or prohibit his using it, fails to do so. That is a simple type of offence, and it is an offence which one could quite reasonably expect to find created by regulations of this sort. But it is said that the word " provided " has a totally different meaning, that it does not mean provided effectively at the relevant moment, but it means that once the master has produced the required article he has provided it, and that even if he takes it away afterwards the workman who uses the machine thereafter is always guilty of a criminal offence because he is not using the guard provided. But if the guard was provided a week before and had subsequently been removed by the master, I cannot see how the workman would be committing an offence under that Regulation, because the simple answer is that at the relevant moment when it falls to the workman to use the machine there is no effective provision of a guard by the master. I have taken the case where the guard having been provided by the master is afterwards removed because that illustrates the point with the greatest simplicity; but it appears to me that any act of the master which effectively places the use of the guard beyond the competence of the workman is a failure by the master to provide the necessary guard, and it matters not whether that failure is due to the fact that having put the guard there he takes it away or locks it up so that it cannot be used, or himself stands with his hand upon it so that the workman cannot touch it, or orders the workman not to use it. In each case he has removed the guard from the effective power of the workman to make use of it. It matters not, in the case where the use of the guard is prohibited, whether the workman if he disobeyed that prohibition and used the guard would be committing a trespass against a chattel belonging to his employer or would be merely committing a breach of his contract of service. The result, in my opinion, in either case is the same, because the guard has been put out of his power to use, unless he chooses to commit—whichever may be the right answer, and I am disposed to think that each answer is right—either a tort or a breach of his contract of employment. Indeed, if the effect of the Regulation was as contended for, I think the draftsman might be congratulated on having produced the very remarkable result of putting the workman in the position that he must either stop work altogether or commit a breach of his contract or a trespass to his master's goods or commit a criminal offence. I myself am happy to be able to read the Regulation in a much more simple, and, in my opinion, a much more commonsense way.

Having regard to the view which I take, the particular matter which the learned judge decided does not fall for decision; but it must not be taken from the fact that I do not enter into a discussion of his reasons that I agree that even if there had been a breach of Regulation No. 23 the plaintiff would have been disentitled to succeed on the facts of this case.

Appeal allowed.
Judgment entered for plaintiff for 750l.

Solicitor for appellant: *Thomas V. Edwards.*
Solicitor for respondents: *Charles St. A. Butcher.*

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[1936. B. 3454.]

Highway—Pedestrian crossing places—Precedence of foot passengers over vehicular traffic—Duty of drivers of vehicles approaching crossing—To allow free passage to any foot passenger on crossing—To proceed at such speed as to be able to stop before reaching crossing—Breach of statutory obligation—Contributory negligence of foot passenger—Whether available as defence—Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 18—*Pedestrian Crossing Places (Traffic) Provisional Regulations,* 1935, *dated January* 25, 1935.

The Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, dated January 25, 1935, made by the Minister of Transport under s. 18 of the Road Traffic Act, 1934, provided as follows :—

"3. The driver of every vehicle approaching a crossing shall, "unless he can see that there is no foot passenger thereon, proceed "at such a speed as to be able if necessary to stop before reaching "such crossing."

"4. The driver of every vehicle at or approaching a crossing "where traffic is not for the time being controlled by a police "constable or by light signals shall allow free and uninterrupted "passage to any foot passenger who is on the carriage-way at "such crossing, and every such foot passenger shall have precedence "over all vehicular traffic at such crossing."

A foot passenger who was crossing a road by a pedestrian crossing which was marked by the prescribed traffic signs, but which was not controlled by a police constable or by light signals, was knocked down and injured by a motor-car as he was about to step on to the opposite kerb. In an action by the foot passenger against the driver of the motor-car for personal injuries :—

Held, that the driver of the motor-car was liable, as the cause of the accident was the failure of the driver to observe the Regulations, which had the force of a statute, and that a plea of contributory negligence on the part of the foot passenger was not open as a defence to the driver of the motor-car.

APPEAL from a decision of Greaves-Lord J.

The plaintiff, Thomas Bailey, claimed damages from the defendant, E. Geddes, for personal injuries caused to him on June 19, 1936, while crossing Holloway Road on a pedestrian crossing at the junction of the Tufnell Park Road, owing to the negligence of the defendant, his servant or agent, in the management and control of the defendant's motor-car in causing or permitting it to collide with the plaintiff, thereby

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causing the plaintiff to suffer severe injuries. Among the particulars of negligence alleged by the plaintiff was that the defendant failed to give the plaintiff free and uninterrupted passage on a pedestrian crossing.

The defendant by his defence denied that he had been guilty of any negligence, and said that the matters complained of were caused by the negligence of the plaintiff in failing to keep a proper or any look-out, or heed the presence or approach of the defendant's motor-car; in crossing or attempting to cross the road without first ascertaining whether it was safe to do so, and without regard to traffic that was or was likely to be using the said road; in suddenly and without warning moving across the path of a tram-car into the path of the defendant's motor-car at a time when it was so close that the defendant, although driving with all due skill and care, was unable to avoid a collision; in failing to take any precautions for his own safety. The defendant also denied that the plaintiff was crossing the road by means of a pedestrian crossing. If the defendant was liable the damages were agreed at 200*l.*

Holloway Road runs in a north-westerly direction towards Highgate. The plaintiff in giving evidence at the trial said that he was walking along the north (meaning the north-east) side of Holloway Road with a friend on his way home at 10.50 P.M., on June 19, 1936; that he crossed the entrance to Bowman's Place, and then commenced to cross Holloway Road by a pedestrian crossing which was marked by Belisha beacons. Holloway Road at this spot was 52 feet wide with two lines of tram-lines running down the centre, the distance between the kerbs on either side and the tram-lines being 20 feet 9 inches and 17 feet respectively. The plaintiff said that as he approached the crossing he saw a tram-car proceeding towards Highgate which had stopped at a tram stop about 28 yards from the pedestrian crossing. He proceeded to cross by the crossing and had gone a few yards when a lorry passed the tram on its near side and went on its way towards Highgate. The tram started when the plaintiff was in the centre of the tram-lines and then pulled up again when about five yards away from the crossing. The plaintiff had nearly reached the opposite kerb when he heard the roar of acceleration of a motor-car which struck him and threw him into the gutter. In cross-examination, the plaintiff said that it was present to his mind that if the lorry passed the moving tram-car something else which had been held up might also pass it. He said that he did not see the defendant's motor-car, although he had a clear view. Evidence was given by a police constable that the defendant's motor-car had pulled up with its rear wheels about 6 inches over the north set of pedestrian crossing studs, and that there were brake marks which commenced about 2 feet 6 inches inside the crossing, which was 12 feet 6 inches wide.

Mr. Fox-Andrews for the defendant then submitted that the plaintiff was clearly guilty of contributory negligence which was the cause of the accident. He, however, called Mr. Francis J. Field, the driver of a motor-car which had come along Tufnell Park Road and had stopped at the mouth of that road (on the south-west side of Holloway Road), who said that whilst sitting in the car waiting to turn north along Holloway Road he saw a lorry coming from the Nags Head, Holloway, going north; a few yards behind that was a tram-car and running on the near side of the tram-car was the defendant's motor-car; both vehicles were moving. He never saw the plaintiff or his friend cross the road at all. The next thing he saw was a slight hesitancy of the tram-car when it was right into the crossing, and then he saw something bundled right into the kerb off the front of the defendant's car, which at that time was a few feet back from the front of the tram.

Greaves-Lord J. held that if a man chose to pass in front of a tram-car and could see when he got across the front that there was a vehicle not more than five yards away from him, his obvious duty was to stop. There was a clear nine feet in which the plaintiff could have stood with perfect safety. He, however, did not choose to stand still; he chose to go on and take the risk whether the driver of the motor-car would be able to pull up. If people did that they were in his opinion as much to blame as the motorist who ran them down. He therefore gave judgment for the defendant.

The Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, dated January 25, 1935, made by the Minister of Transport under s. 18 of the Road Traffic Act, 1934, provided as follows :—

" 2. For the purpose of these Regulations unless the "context otherwise requires the expression ' crossing ' means "a crossing place for foot passengers indicated by a traffic "sign prescribed for the purpose by Regulations made by "the Minister."

" 3. The driver of every vehicle approaching a crossing "shall, unless he can see that there is no foot passenger thereon, "proceed at such a speed as to be able if necessary to stop "before reaching such crossing."

" 4. The driver of every vehicle at or approaching a crossing "where traffic is not for the time being controlled by a police "constable or by light signals shall allow free and uninterrupted "passage to any foot passenger who is on the carriage-way at "such crossing, and every such foot passenger shall have "precedence over all vehicular traffic at such crossing."

The plaintiff appealed.

J. D. Cassels K.C. and *F. G. Paterson* for the appellant. The learned judge was wrong in disregarding the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, which have the force of a statute. Those Regulations contemplate that vehicular traffic will give way to pedestrians at such crossings, and pedestrians are entitled to assume that the Regulations will be obeyed by the drivers of motor-cars. A motor-car ought to approach a pedestrian crossing in accordance with the Regulations, and in such a way that it could pull up at the crossing. The judge was wrong in finding that the plaintiff was guilty of contributory negligence in not seeing the defendant's motor-car. It is not negligence for a pedestrian to assume that the Regulations will be obeyed

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by the driver of a motor-car. The cases in which it has been held that contributory negligence is a defence to a breach of statutory duty have all been cases under the Factory and Workshop Act. Here the accident was not due to the plaintiff's contributory negligence, but because the driver of the motor-car did not stop as the Regulations require.

[They were stopped.]

Cartwright Sharp K.C. and *N. R. Fox-Andrews* for the respondent. This is a clear case of the accident being caused by contributory negligence on the part of the plaintiff which disentitles him from recovering. The Regulations do not mean that if the view of the driver of the motor-car is obscured by vehicles that he must stop until his view is not obscured. The words " unless he can see " in Regulation 3 cannot mean that the driver of a motor-car cannot proceed unless he can satisfy himself by visual evidence that no foot passenger is on the crossing. The word " see " must mean ascertain by eyesight or by other reasonable deduction. If traffic is proceeding across a pedestrian crossing it is reasonable for the driver of a motor-car to assume that the crossing is free, and to proceed across the crossing although he cannot see what is on the crossing. The fact that under Regulation 4 a foot passenger is given precedence over all vehicular traffic at a pedestrian crossing does not mean that he may close his eyes to the oncoming traffic and assume that all traffic will stop ; he must still take elementary care, and must not cross in front of moving vehicles. The judge held that the plaintiff was making use of the crossing in a highly dangerous way and that his negligence was really the cause of the accident, even though the defendant broke the Regulations. The accident was due to the plaintiff's negligence in suddenly stepping in front of the defendant's motor-car. The Regulations cannot mean that a motor-car must stop if a pedestrian suddenly steps on to the crossing from the side of the road. It was decided by the Court of Appeal in *Flower* v. *Ebbw Vale Steel, Iron & Coal Co.* (1) that contributory negligence of the plaintiff is a valid defence to an action founded on breach of a statutory duty by the defendant. In the House of Lords (1) Lord Atkin expressly reserved the point, and the dictum of Lord Wright to the contrary was not followed by the Court of Appeal in *Craze* v. *Meyer-Dumore Bottlers' Equipment Co.* (2)

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(1) [1934] 2 K. B. 132.

GREER L.J. This is an appeal from a decision of Greaves-Lord J. in an action in which the plaintiff alleged that the defendant had been guilty of a breach of the statutory Regulations relating to the crossings known as the crossings at Belisha beacons. It is, of course, a matter of grave importance to the public that the Regulations which have been made for the protection of the public who venture to cross at those supposedly safe crossings should be strictly adhered to. [His Lordship read Regulations Nos. 3 and 4 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, and continued :]

The facts proved in this case are quite plain and really indisputable. The two foot passengers, who were on the north side of the road, in order to get to the Belisha crossing had to cross the entrance to Bowman's Place. They did that, according to their evidence, which was not contradicted. They came to the Belisha crossing, and their view for a time was obscured by reason of the fact that a tram and a lorry were passing, and though it might have been held to be negligent, if they had not been at a Belisha crossing, to start crossing at a time when they could not see by reason of the other vehicles whether there was any car approaching the crossing, they on this occasion were under no such liability, because they were protected by the Regulations which had been passed, and they were entitled to suppose that vehicles approaching the crossing would strictly obey the Regulations which were passed for the benefit of foot passengers.

The learned judge was told that there was an independent witness to be called on behalf of the defendant, and that witness was called. He was a witness who was stopping at the outlet of Tufnell Park Road, on the opposite side of

(1) [1936] A. C. 206.

(2) [1936] W. N. 217.

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the Holloway Road. So far from assisting the defendant's case, he proved the plaintiff's case up to the hilt. He did not see the actual accident, but it took place when the two men who were crossing had nearly crossed the road. One of them was fortunate enough to escape; the other one was just too late, but would have been fully and clearly protected if effect had been given by the driver of the car to the Regulations. But it was not, and it is obvious that before the driver of the approaching car got to the crossing he must have had an opportunity of seeing these two men upon the crossing and an opportunity, therefore, of strictly adhering to the Regulations Nos. 3 and 4.

The unfortunate part of the case was this. The judge having stopped the case when the case was apparently (as it seems to me) proved up to the hilt on behalf of the plaintiff, we are now asked to say that there ought to be a new trial, because other evidence might have been given which would have affected the case. In my judgment, no new trial ought to be ordered in this case, because the evidence which it is suggested might have been given was available at the trial, and counsel, for good reasons or bad, did not think it worth while to ask the judge to wait until that evidence was given before he gave his judgment. In my opinion, the evidence, if given, could not have altered the accepted facts of the case, which were not contradicted—namely, that these two men were on the Belisha crossing, that they were visible to the oncoming car, that the plaintiff had very nearly crossed the road at the time he was knocked down, and the fact that the defendant's motor-car had passed over the crossing before it stopped. In those circumstances, though the learned judge, if applied to, would, I have no doubt, have allowed the further evidence to be given, I do not think it could in any event have affected this case, and his failure to give an opportunity for the further evidence to be given would not, and could not, amount to a denial of justice.

I think the decision of the learned judge was wrong and that he ought to have decided that the sole cause of this accident was the failure of the defendant driver to observe the Regulations. In my opinion there was no evidence on which he could hold that there was any negligence on the part of those crossing the road at the Belisha crossing.

For those reasons, I think the learned judge's decision must be reversed and, as the damages were agreed, this Court should enter judgment for the plaintiff for the agreed amount of damages.

SLESSER L.J. I am of the same opinion. In my view, in fairness to the learned judge, it should be said that part of the difficulty which has arisen in this case has come from the fact that the statutory Regulations in question, namely the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, made under s. 18 of the Road Traffic Act, 1934, were never clearly put before the learned judge at all. Throughout the argument, which I have read, reference is made to the Highway Code. The only effect of the Highway Code, so far as legal authority is concerned, is under s. 45, sub-s. 4, of the Road Traffic Act, 1930, to the effect that: " A failure on the part of any person to observe any provision "of the Highway Code shall not of itself render that person "liable to criminal proceedings of any kind, but any such "failure may in any proceedings (whether civil or criminal, "and including proceedings for an offence under this Act) "be relied upon by any party to the proceedings as tending "to establish or to negative any liability which is in question "in those proceedings." It is, therefore, from a legal point of view far less potent than the Regulations which we have here to consider—namely, the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935.

Now the reason why I think the judge never really gave full effect to these Regulations appears in his judgment, where he starts off by saying: " First of all, I do not agree "with the artificial reading of the Highway Code which is "suggested." True it is that Mr. Paterson, in using the Highway Code in his argument, quoted from page 23 of the Highway Code, which does paraphrase the Pedestrian Crossing Places (Traffic) Provisional Regulation which covers this case and to that extent the statutory Regulation was brought before the learned judge. But, the Highway Code being referred to in that way, I do not think the learned judge fully appreciated, in the way in which the argument was conducted, that he had to deal with a Regulation made under a statute having the force of law. At any rate, I think that is the reason, or one of the reasons, why he came to his conclusion.

I have made these remarks in justice to the learned judge, because I think the proper way in which this case ought to have been argued for the plaintiff was to have put the Regulations as such before the learned judge and not the paraphrase of it contained in the Highway Code. When one looks at those Regulations I agree with my Lord that they are fatal to the defendant's case. Assuming, as one must on this evidence, that the plaintiff was on the pedestrian crossing, two clauses in the 1935 Regulations apply, para. 3 of which provides : " The driver of every vehicle approaching "a crossing shall, unless he can see that there is no foot "passenger thereon, proceed at such a speed as to be able if "necessary to stop before reaching such crossing." That Regulation appears to me to be positive in its terms, not that there is any general right to proceed at a speed which may or may not make it possible to stop before reaching such crossing, but that unless the driver can see there is no foot passenger thereon he is under an obligation to proceed at such a speed as to be able, if necessary, to stop before reaching such crossing. In this case it is obvious on the evidence that he was unable to see that there was no foot passenger thereon. There were, in fact, two foot passengers at least thereon, and thereupon it became his absolute statutory duty to proceed in such a manner as to be able, if necessary, to stop before reaching such crossing. Then para. 4 says this, dealing with this type of crossing : " Every such foot passenger "shall have precedence over all vehicular traffic at such "crossing." That I understand to mean that the foot passenger is to be allowed to cross before the driver of the approaching vehicle attempts to proceed to a point where he might come into collision with the foot passenger once the foot passenger is on the crossing. These appear to me to be positive Regulations.

Now what is said by Mr. Cartwright Sharp is this, that there is nothing in these paragraphs to exclude the doctrine, as it is called, of contributory negligence. As I understand it, what is called the defence of contributory negligence in cases of breach of a statutory provision on the part of the plaintiff is really this: it is said that on the facts of the particular case the injury was not caused by the breach of the statute at all, but was caused by the negligence of the plaintiff himself. That principle has found expression in many cases, and I think in the present state of the law is binding on this Court, albeit certain doubts may or may not have been expressed on the principle in the House of Lords. Where it can be shown that though there be a breach of a statutory Regulation the damage is actually caused by the negligence of the plaintiff himself, and that that is the cause of the injury, that is a defence in the mouth of the defendant, who broke the statutory Regulation.

That is the latest condition of the law, as I understand it, as stated in this Court by Scrutton L.J. in *Flower* v. *Ebbw Vale Steel, Iron & Coal Co.* (1) What he says is this: " As "to the question of law "—which is the one I have stated—" in my opinion this Court is bound by its own decision in "*Dew* v. *United British Steamship Co., Ld.* (2), in which all the "members of the Court, as I read the judgments, stated that "contributory negligence of a plaintiff was a defence to an "action for an admitted breach of a statute." Speaking for myself, I am unable to find anything in any subsequent decision, either in this Court or in the House of Lords, which binds us to say, at the moment, anything to the contrary, albeit some doubt may have been cast upon that doctrine, more particularly in the speech of Lord Wright in *Flower* v. *Ebbw Vale Steel, Iron & Coal Co.* (3)

That being so, Mr. Cartwright Sharp says that, admitting that the defendant broke this Regulation, nevertheless the

(1) [1934] 2 K. B. 132, 145.
(2) (1928) 139 L. T. 628.
(3) [1936] A. C. 206, 210.

cause of the plaintiff's damage was his contributory negligence in not keeping a proper look-out to see that the defendant's motor-car was approaching. I think the answer to that contention is contained in the Regulations. These Regulations are so framed as to make it impossible, when they apply, for any such defence to be raised, and for this reason. Regulation No. 3 says that unless the driver can see that there is no foot passenger thereon he must proceed at such a speed as to be able, if necessary, to stop before reaching such crossing; and No. 4 imposes an obligation upon him to give precedence to a foot passenger on the crossing. Now if his duty is to stop it is physically impossible in such a case that the cause of the accident can be the negligence of the plaintiff, because ex hypothesi the defendant, if he has done his duty, has already stopped.

Each of these cases must depend upon a consideration of the particular language of the particular Regulation. The questions which may arise and which have arisen in cases of breach of statutory duty under the Factory and Workshop Act, whether the breach of statutory duty or the negligence of the injured workman is the cause of the accident, cannot arise in the case of a geographical area such as a crossing where the duty is to stop before the vehicle reaches the crossing at all. If the obligation on the driver of the vehicle under the Regulations is to stop outside the crossing it is impossible that what is done inside the crossing can be the fault or the negligence of the plaintiff himself, because, if the Regulations had been obeyed, there would have been no car upon the crossing at all which could, on any view, have injured the plaintiff.

For these reasons, I think that, while the doctrine of contributory negligence may apply in appropriate cases, the language of these particular Regulations, when a breach of them has been committed, makes it impossible for the driver of the offending vehicle to rely on contributory negligence. Once the vehicle is wrongly on that crossing it does not lie in the mouth of the driver of that vehicle to say to the pedestrian: "You have caused this accident by your negligence," because if he had obeyed the Regulations the driver never would have been on the crossing.

I agree, therefore, with my Lord that this appeal succeeds.

SCOTT L.J. I agree with both judgments. The case is one of great public importance, because the effectiveness of the Regulations providing for the safety of foot passengers on pedestrian crossings is really involved in our decision. If a plea of contributory negligence were open to the driver of a motor-car in the case of an accident to a foot passenger on a crossing caused to him by the motor-car within the limits of the crossing it would completely abolish the safety of the crossing which is intended by these Regulations. The Regulations have the same statutory force as if they were in the statute itself, being made under s. 18 of the Road Traffic Act, 1934. In my view, it is of the very essence of the safety of our streets, on the one hand, that the foot passenger public should cross the streets by the pedestrian crossings and not at a place where there is no crossing; and, on the other hand, that at the pedestrian crossings motor traffic should really recognize the overpowering obligation imposed by the Pedestrian Crossing Places (Traffic) Provisional Regulations so to check their speed that they can, if necessary, stop in order to give to pedestrians on the crossings the safety which it is intended they should have. I entirely agree with what Slesser L.J. has just said, that the idea of a plea of contributory negligence is fundamentally inconsistent with the very basis of the Regulations, and that is the ground upon which this appeal must necessarily be allowed.

The questions, what is the duty of approaching traffic to pedestrians waiting on the kerb in order to embark upon a crossing, and what is the duty of the pedestrian waiting there at least of courtesy to approaching traffic, do not arise in this case; though I think the duties can be deduced from the Regulations pretty clearly. But it does seem to me that the management of street traffic in our great cities is really dependent upon the satisfactory enforcement of the provisions with regard to the relative rights and duties of pedestrians and vehicular traffic contained in the Regulations.

Appeal allowed.
Judgment entered for the plaintiff
for the agreed sum of damages.

Solicitors for appellant : *Raymonds.*
Solicitors for respondent : *Stanley & Co.*

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HAGEN *v.* NATIONAL PROVINCIAL BANK, LIMITED, AND ANOTHER.

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July 19.

[1937. H. 1203.]

Practice—Non-commercial action—Action for slander—Trial with City of London special jury—Refusal of Master to make order—Application for transfer of action to Commercial List—Refusal of judge in charge of Commercial List to make order—Jurisdiction of Master and judge at Chambers to order trial with City of London special jury—Rules of the Supreme Court, Order XXXVI., *r.* 9.

The Master or the judge in Chambers has power under the Rules to order a cause, which is not a commercial cause, to be tried in London with a City of London special jury.

The practice which has arisen, since the decision of Scrutton J. in *Barnes* v. *Lawson* (1911) 16 Com. Cas. 74, that in all actions, including those which are not commercial causes, where notice has been given for trial with a City of London special jury, of applying to the judge in charge of the Commercial List to transfer the action to the Commercial List with the object of ordering trial of the action with a London special jury, is not justified by the Judicature Act or by the Rules made under the Judicature Act.

The judge in charge of the Commercial List is justified in refusing to transfer to the Commercial List an action, which is not a commercial cause, merely to enable it to be tried with a City of London special jury.

APPEAL from a decision of Porter J. sitting in Chambers.

The plaintiff, Julius Hagen, brought an action against the National Provincial Bank, Ld., and Hugh Reginald Vincent for slander. The defendants applied to Master Ball for an order that the action should be tried with a City of London special jury. Master Ball, considering that he was bound by the practice which had been adopted following the decision of Scrutton J. in *Barnes* v. *Lawson* (1), refused to make the order asked for, but made an order for trial of the action in Middlesex with a Middlesex special jury. The defendants did not appeal against that order, but made an application to Porter J., who was the judge in charge of the Commercial List, to transfer the action to the Commercial List, and to order the trial of the action with a special jury of the City of London.

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(1) (1911) 16 Com. Cas. 74.

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Porter J. refused to make the order, as he did not consider the action was a proper action to be tried in the Commercial List.

The defendants appealed.

P. B. Morle for the appellants. The decision of the learned judge was wrong. The effect of it would be to prevent parties from having actions which are not commercial actions tried with a City of London special jury. Before 1882 City of London actions were tried at the Guildhall. After the Royal Courts of Justice were opened in 1882 an Order in Council was made on May 22, 1883, that City of London actions were to be tried at the Royal Courts of Justice. There was subsequently a great falling off of City of London actions. In 1891 an Act was passed which provided for the trial of civil actions at the Guildhall, but that Act turned out to be a dead letter. On May 24, 1894, the judges of the Queen's Bench Division passed resolutions for making further provision for the despatch of commercial business. Resolution No. 14 provided " that it is desirable that a list should be made of "commercial causes to be tried at the Royal Courts of Justice "by a judge alone or by jurors summoned from the City, and "that a Commercial Court should be constituted of judges to "be named by the judges of the Queen's Bench Division." It is stated in the Annual Practice for 1937, p. 2649, that " the venue in all commercial cases is the City of London, "and unless tried by the judge alone they are tried with a "London jury." The Rules require separate lists to be kept of the City of London causes and Middlesex causes. After 1895 it became the practice, no doubt in order to avoid the inconvenience of there being two separate lists of London jury causes, one commercial and one non-commercial, to enter all actions which were to be tried with a City of London jury in the Commercial List without a formal order of transfer, and this practice continued down to 1911. In 1911 the question arose in a non-commercial cause, which was to be tried with a City of London special jury, to whom interlocutory

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(1) 16 Com. Cas. 74.

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applications should be made, and it was held by Scrutton J., after consultation with Lord Alverstone C.J., in *Barnes* v. *Lawson* (1), that in all actions, when notice has been given for a London special jury, there should be a formal application for transfer to the Commercial List, after which interlocutory applications should be made to the judge in charge of that list. Since that decision a practice has grown up that any action, though not a commercial cause, where notice has been given for trial with a special jury of the City of London, should be transferred to the Commercial List—see Annual Practice for 1937, pp. 491, 2650—and no application for trial of a non-commercial cause with a City of London special jury will be entertained by a Master. It is stated in the Annual Practice for 1937, p. 607, in the notes to Order XXXVI., r. 9, that " any application for trial with a City of London jury "is to be referred to the judge in charge of the Commercial List," and that " after order for trial with a City of London jury, "subsequent interlocutory applications are to be made to the "judge in charge of the Commercial List." See also the Yearly Practice for 1937, p. 582. The right of a litigant to trial of his action with a City of London special jury is not limited to a commercial action. The defendants' application for a transfer of the action to the Commercial List was made not because it was a commercial cause, but merely to obtain a trial with a City of London special jury. Porter J. said he would not make an order for trial with a City of London special jury except in a commercial cause, and he refused to transfer the action to the Commercial List for the purpose of obtaining a trial with a City of London special jury because it was not a commercial cause. According to the Rules a Master has jurisdiction to order the venue of the trial of an action in the City of London, but because of the practice which has grown up since the decision in *Barnes* v. *Lawson* (1) he will not make such an order. The defendants will be satisfied if they are given an extension of time for appealing against the order made by Master Ball if the Court express their view that a Master or the judge at Chambers has jurisdiction to make an order for the trial of an action with a City of London special jury.

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(1) 16 Com. Cas. 74.

H. J. Wallington K.C. and *Cyril Salmon* for the respondent. The order of Master Ball fixing the venue of the trial in Middlesex with a Middlesex special jury was made by him after looking at the pleadings. His attention was not called to *Barnes* v. *Lawson.* (1) The proper procedure was for the defendants to have appealed against the Master's order. Instead of doing that the defendants applied to the judge in charge of the Commercial List to transfer the action to the Commercial List. This the judge refused to do, as the action was not a proper one to be tried in the Commercial List as it was an action for slander. The judge's decision in that respect was correct. According to the Rules a Master or the judge in Chambers has jurisdiction to order the trial of any action with a City of London special jury. In the present case the Master probably refused to make such an order and acted as he did on account of the prevailing practice. The plaintiff, however, objects to the defendants having the order which they seek at the plaintiff's expense, as the plaintiff was in no way responsible for the Master's order.

P. B. Morle in reply. Master Ball, who refused to make an order for the trial of the action with a City of London special jury, is one of the editors of the Annual Practice, and therefore did not require to be reminded of the existing practice. Until Porter J. said that that practice was erroneous the defendants were not aware of that fact. The Rules permit a subsequent application to be made for altering the venue without the necessity of an appeal from the Master's order.

GREER L.J. In this case the defendants appeal from an interlocutory order made by the learned judge who was taking the Commercial List, Porter J., who felt that he was not bound to order the transfer of the case to the Commercial List merely for the purpose of providing a trial with a special jury of the City of London, the case being, in his judgment, not a commercial cause at all, as it obviously was not, being an action for damages for slander. In these circumstances the question is: What ought we to do? I am satisfied that there is nothing in the Judicature Acts or in the Rules made thereunder, which prohibits the Master, or the judge at Chambers on appeal from the Master, from making an order that the venue shall be London, and the action shall be tried by a City of London special jury. The Master probably thought, having regard to the practice which has arisen, that he ought not to exercise the powers which we think he had, and that he ought to follow the practice which was laid down by Scrutton J. in the case of *Barnes* v. *Lawson* (1) to the effect that in all actions where notice has been given for trial with a London special jury, there ought to be a formal application for transfer to the Commercial List, after which all interlocutory applications should be made to the judge in charge of that list.

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(1) 16 Com. Cas. 74.

In my judgment there was nothing in the Judicature Act and nothing in the Rules made under the Judicature Act which rendered necessary the decision of Scrutton J. given after consultation with Lord Alverstone C.J. in *Barnes* v. *Lawson* (1), because under the Rules there are special rules of practice applicable to cases in the Commercial List which are not applicable in an ordinary case; that is to say, all interlocutory applications have to be made to the judge himself instead of following the usual practice in King's Bench actions of applying first to a Master, with an appeal to the judge in Chambers, and then, if the decision of the judge does not satisfy the party against whom the order is made, an appeal to this Court. In those circumstances the Master, who could not have been ignorant of the practice, because he is the editor of one of the books of practice, made an order for trial with a jury of the county of Middlesex, and that order may be reviewed on appeal to the judge in Chambers. The only difficulty is that having regard to the doubt created by reason of the practice which has grown up since *Barnes* v. *Lawson* (1), the learned Master may have felt that he ought not to make the order which he was asked to make, for trial with a London

(1) 16 Com. Cas. 74.

special jury. In these circumstances we think the proper order to make is that the time be extended for seven days from to-day for the appellants to appeal from the Master's order to the judge, with the intimation that this Court considers that the judge, notwithstanding the practice which has prevailed of applying for transfer to the Commercial List, has power to make an order for the venue to be London and for the trial to be with a London special jury. In the result, we think that so far as the costs of this appeal are concerned, they ought to be costs in the cause.

SLESSER L.J. I agree.

SCOTT L.J. I agree, but desire to add one or two words. As I understand it, before the learned Master the defendants recognized the force of what appears in the Annual Practice and Yearly Practice as to cases where parties desire trial with a London special jury which are not commercial causes. That practice, as appearing in the practice books, is that a formal application should be made to the judge in charge of the Commercial List to call the cause a commercial cause and transfer it to the Commercial List with the special object of ordering trial with a City of London special jury. Consequently, in my view, the learned Master never exercised his discretion on the question whether or not the action was one which was suitable for trial with a London special jury. Porter J., having considered that practice, evidently came to the conclusion that it was not founded on anything in the Judicature Acts or the Rules, or upon the practice in relation to the constitution of the Commercial Court, and that it would be wrong to put a case into the Commercial List which was not a commercial cause at all, and consequently rejected this application. In doing so I think he was right. In the circumstances I entirely agree that the proper course is that the matter should be considered de novo by the proper tribunal under the Rules, which in the circumstances, I think, is the judge in Chambers on appeal from Master Ball, who ordered trial with a Middlesex special jury, ordering it not in the exercise of a discretion—because he thought a Middlesex special jury better than a London special jury—but because he thought he could not order trial with a London special jury on account of this supposed practice. When the matter comes before the judge in Chambers pursuant to our order, the learned judge will himself exercise a discretion, knowing that the Master has not exercised any discretion, and himself decide what is the appropriate special jury for the trial of this case.

GREER L.J. The Court being of opinion that the Master or the judge in Chambers has the power to order a cause to be tried with a London special jury, the time for appeal from the Master will be extended for seven days.

Appeal dismissed.

Solicitors for appellants: *Wilde, Sapte & Co.*
Solicitors for respondent: *Woolfe & Woolfe.*

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April 12, 13.

BRENDON *v.* SPIRO.

Solicitor—Alleged professional misconduct—Solicitor no longer on record —Application for order that solicitor pay costs personally—Jurisdiction of judge—Form of procedure—Summary application to judge.

A judge of the High Court, before whom an action has been tried, has inherent jurisdiction to entertain an application that a solicitor who has acted for a party should, on the alleged ground of his professional misconduct, pay personally the costs ordered to be paid by that party, notwithstanding that the solicitor has ceased to be on the record of the action before the verdict was returned or even before the trial began.

Simes v. *Gibbs* (1838) 6 Dowl. P. C. 310 followed.

In such a case the application should be made summarily to the trial judge, and need not be made to the Divisional Court on affidavit, or in any other form; and it is for the judge in his discretion to give such directions in regard to the making of the application as seem to him to be necessary.

APPEAL from an order of Greaves-Lord J.

On October 19, 1936, Messrs. Robert E. H. Brendon, John W. Brendon, and Thomas R. McCready (executors of Mr. Charles Ernest Brendon, deceased), the said J. W. Brendon, Arthur G. C. Brendon (an infant), and Mrs. Heather B. Brendon (widow), brought the present action against Mr. Stanley Grove Spiro, Messrs. Maclean & Henderson (a firm), Messrs. S. R. Bunt & Co. (a firm), Mr. Samuel Taylor, who was the person trading as Bunt & Co., Mr. A. Graham, Mr. William Underhill, and the Scottish Gas Utilities Corporation, Ld., claiming as against all the defendants damages for alleged fraud in respect of certain stocks and shares, and for certain other alleged acts or defaults.

On November 2, 1936, Messrs. Ralph Wood & Co., solicitors, entered an appearance to the writ on behalf of the defendants Maclean & Henderson and W. Underhill, and continued to act for both these defendants until they gave the notice mentioned below.

On November 3, 1936, Mr. T. Griffiths, solicitor, entered an appearance to the writ on behalf of each of the defendants Samuel Taylor trading as S. R. Bunt & Co., and Samuel

Taylor personally, and continued to act for these defendants until they gave the next mentioned notice.

Appearances were entered on behalf of the other defendants.

Defences were delivered on behalf of the respective defendants, denying the allegations of the plaintiffs.

On February 17, 1937, notice was given that Mr. T. Griffiths ceased to act as solicitor for the defendant Samuel Taylor personally, and on February 18, 1937, notice was given that he ceased to act as solicitor for the defendant Samuel Taylor trading as S. R. Bunt & Co., a change of solicitors for these defendants having then taken place and other solicitors having been appointed to act for them.

On February 25, 1937, the trial of the action began before Greaves-Lord J. and a special jury.

On February 26, 1937, notice was given that Ralph Wood & Co. ceased to act as solicitors for the defendants Maclean & Henderson, a change of solicitors for these defendants then taking place and other solicitors being appointed to act for them. These solicitors, however, continued to act for the defendant W. Underhill.

On March 1, 1937, the trial of the action concluded, when the jury returned a verdict for the plaintiffs against all the defendants other than Mr. Graham and the Scottish Gas Utilities Corporation, Ld., for 11,364*l.* damages, and judgment for that amount was entered against all except the two last named defendants with costs.

As soon as the jury had returned their verdict in the action counsel for the plaintiffs intimated to the learned judge that he proposed to apply for an order that Mr. T. Griffiths and Messrs. Ralph Wood & Co. should pay personally to the plaintiffs the costs ordered to be paid to the plaintiffs by those defendants who had been their respective former clients; but the judge took the view that before the application could be entertained it was essential that these solicitors who were not present in Court should have been given notice of the application, and he directed that notice thereof should be given to them by way of motion, and that thereafter the matter should again be brought before him.

The plaintiffs accordingly gave to these solicitors formal notice dated March 6, 1937, of their intention to make an application to Greaves-Lord J. for an order that Mr. T. Griffiths, solicitor, should personally pay to the plaintiffs such of the costs of the action as were ordered under the terms of the final judgment in the action to be paid to the plaintiffs by the defendants S. R. Bunt & Co. and the defendant S. Taylor, and that Messrs. Ralph Wood & Co., solicitors, should personally pay to the plaintiffs such of the costs of the action as were ordered under the terms of the judgment to be paid to the plaintiffs by the defendants Maclean & Henderson and the defendant W. Underhill; on the grounds that the said solicitors while acting in the action as such solicitors had been guilty of certain acts of professional misconduct alleged against them by the plaintiffs, and set out in the said notice of application.

The grounds alleged in respect of Mr. T. Griffiths, all of which he denied, included the following—namely: that he, purporting to write on behalf of the defendants S. R. Bunt & Co., wrote to the plaintiffs' solicitors certain letters which were to his knowledge untrue in substance, were calculated to mislead the plaintiffs, and were written without the authority of the defendants; that he entered appearance to the action ostensibly on behalf of the defendants S. R. Bunt & Co. and S. Taylor without their authority; that he gave instructions for a defence to the claim ostensibly on behalf of the said defendants which contained statements and raised issues false to his knowledge, calculated to mislead the plaintiffs, and delivered without the authority of these defendants; that he caused to be sworn by the defendant Taylor an affidavit purporting to disclose all documents in possession of the said defendants wherein no such documents were disclosed notwithstanding that he knew that there were or had been in such possession among other relevant documents certain letters, books of account, and agreements; that he continued to act in the action for these defendants notwithstanding that he was aware or put to his inquiry that these defendants were raising false issues therein.

The grounds alleged in the case of Messrs. Ralph Wood & Co.

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which they also denied, included the following—namely: that they, knowing that the defendant Spiro was the actual owner of the business of the defendants Maclean & Henderson, took instructions from him to accept service on behalf of these defendants, did in fact accept such service, and nevertheless entered appearance in the action on behalf of one J. W. R. Elphinstone, trading as Maclean & Henderson, without instructions from Elphinstone so to do; that they, having notice of an allegation that the firm of Maclean & Henderson had been acquired by the defendant Spiro for his nominee Elphinstone, raised on the pleadings a false issue and thereby misled and delayed the plaintiffs by denying such facts, which were then known to them, to be true. That they, knowing that Spiro was the true owner of Maclean & Henderson, and was the proper person to swear an affidavit of documents on behalf of the defendants Maclean & Henderson, procured an affidavit on behalf of these defendants to which the deponent was the defendant Underhill; that they had failed to include in that affidavit certain facts, books of account, and other documents which ought to have been included therein; that they permitted the said defendants to default in the delivery of answers to interrogatories; that they, though aware of the fact that, as regards the defendants Maclean & Henderson, on the information before them, there was no defence to the action, nevertheless continued to act for these defendants in defending the action; that they, having discovered that the instructions for the defence of these defendants was false, nevertheless continued to represent these defendants up to the date of the trial.

The application came before the judge on March 15, 1937, when it was heard for some time but adjourned, and it came again before him on March 17, 1937, when it was further heard, the hearing on these two occasions taking in all more than a whole day of the Court's time. At the hearing on these occasions it was contended on behalf of the said solicitors that as from the date when each of them ceased to represent the defendants for whom they had acted, the judge ceased to have any jurisdiction over him or them in respect of

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matters that had happened before that date; and that the judge was not, therefore, entitled to consider a claim that the solicitors should be ordered to pay costs due to the plaintiff by reason of the professional misconduct alleged against them before they had ceased to be such solicitors. It was further contended on behalf of these solicitors that, in any event, the judge was not entitled to hear the application because no affidavit had been filed verifying the facts upon which the application was based.

Greaves-Lord J., on the second day of the hearing, March 17, 1937, delivered a short judgment stating in effect that, after having given attention to the matters which had been put before him on behalf of the plaintiffs in order to substantiate and justify the motion, he thought that they were matters which would be well worthy of inquiry. In all the circumstances the matters affecting these two solicitors ought to be the subject of investigation, because he did not believe that it was good for the administration of justice, or for the interests of the legal profession or for the public at large, that they should be left in doubt. So far as he could see, however, no authority which had been cited to him showed that in such a case as this he had jurisdiction to make the order asked for, and therefore he had to decline to make it. He would not say more, because, if he did, he might go further than his position, as he conceived it to be, would warrant. In order to avoid saying anything which he might have no jurisdiction to say he would merely dismiss the motion. If it was necessary for him to give leave to appeal he would give it, because he thought that the matter should be put beyond any doubt.

The plaintiffs appealed. The appeal was heard on April 12 and 13, 1937.

W. A. L. Raeburn for the plaintiffs, appellants. Greaves-Lord J. was wrong in holding that he could not entertain the application of the appellants that these solicitors, Mr. T. Griffiths and Messrs. Ralph Wood & Co., should pay personally the costs ordered to be paid by the defendants whom they represented on the ground that they had been guilty of professional misconduct during the proceedings in the action. First, he was wrong in holding that he had no jurisdiction by reason of the fact that these solicitors had ceased to be on the record of the action before the application was made. It is a principle of law which requires no decided case to support it that a judge before whom an action comes for trial has inherent and summary jurisdiction to entertain an application against a solicitor who has acted for a party in the action and is alleged to have been guilty of professional misconduct in the course of the proceedings in the action even though he is no longer on the record of the action. If the solicitor was on the record at the time when the alleged misconduct took place it is immaterial that he is no longer on the record when the application against him is made. The solicitor cannot escape from the jurisdiction by merely ceasing to be upon the record. In the case of *Simes* v. *Gibbs* (1) it was held that an attorney was liable to the summary jurisdiction of the Court for misconduct while one of its officers although at the time of the application against him he had ceased to be an attorney. That case is stronger than and conclusive of the present case, inasmuch as here the solicitors at the time of the application against them had not ceased to be solicitors but had only ceased to be on the record. A solicitor who assumes to act for a party to an action without the authority of that party or for a supposed party who is non-existent in fact is amenable to the jurisdiction of the Court for that or other misconduct and may be ordered to pay costs or otherwise punished: *Yonge* v. *Toynbee* (2); *Simmons* v. *Liberal Opinion, Ld.* (3); *In re Gray* (4); and the principle of these cases is applicable to the present case, inasmuch as in none of these cases can the solicitor have been properly concerned in the action in respect of the party for whom he presumed to act. The expression "professional "misconduct" as applicable to a solicitor has been defined to some extent for the purposes of the Solicitors Acts: *In re A Solicitor. Ex parte The Law Society* (5), and it is submitted

(1) 6 Dowl. P. C. 310.
(2) [1910] 1 K. B. 215.
(3) [1911] 1 K. B. 966.
(4) (1869) 20 L. T. 730.
(5) [1912] 1 K. B. 302.

that the conduct alleged against the solicitors in the present case comes within the scope of that expression and would, if proved, entitle the Court to visit them with costs: see Annual Practice, 1937, p. 2337. If this Court holds that the judge had jurisdiction to entertain the application the case must go back to him to be dealt with.

Roland Burrows K.C. and *Harold Simmons* for Mr. T. Griffiths, respondent. The learned judge rightly declined to entertain the application for an order upon this respondent to pay costs on the ground of alleged professional misconduct. First, the judge had no jurisdiction to entertain the application because before the action came on for hearing this respondent had been removed from the record. It is submitted that the principle is that the Court has summary jurisdiction to consider and deal with the conduct of the parties to an action and their solicitors provided that they are actually before the Court, but that it has no jurisdiction to deal with the conduct of parties or their solicitors where they have never been actually before the Court or where they have ceased to be before the Court. There is no precedent to support the contention of the appellants that a solicitor who has never at any time been before the Court during the whole course of the trial of an action can be afterwards brought before it by an application in or arising out of the action. An order upon an attorney of one of the parties to pay the costs incurred in the proceedings in a cause, he not being a party applying to the Court, was held bad: *Rouch* v. *Alberti. Ex parte Wood* (1); and where no misconduct had been alleged or proved against a solicitor in regard to the proceedings at the trial it was held that he could not on other grounds be made liable for costs: *In re Gregg.* (2) The judge who has tried an action can have no power to deal with the conduct of a person whether party or solicitor who has never been before him during the trial, as if he did so he would be dealing with that person in respect of res inter alios acta. The mere fact that a solicitor has at some time in the past been connected with an action does not entitle the Court to call him summarily before it and require him then and there to answer to a charge of misconduct. Secondly, the judge rightly refused to entertain the application because it was not made in proper form. An application of this kind against a solicitor charging him with unprofessional conduct in an action in which he is no longer engaged should be made to the Divisional Court by substantive motion or summons, of which he is given due notice, setting out the grounds of the application and supported by affidavit evidence verifying these grounds, and should not be made by an application in or arising out of the action in respect of which the misconduct is alleged to have taken place: see *Rouch* v. *Alberti. Ex parte Wood* (1); *Martinson* v. *Clowes* (2); *In re Hulm & Lewis* (3); and *In re Rees.* (4) The case of *Simes* v. *Gibbs* (5), relied upon by the appellants, does not show that an application, that a solicitor who has ceased to be on the record should pay costs on the ground of alleged professional misconduct in an action, may be made in the action, but only that a substantive application supported by affidavit may be made for that purpose. There are no doubt exceptional cases where the application may be made to the trial judge, but only where the judge has directed the application to be made to him after a reasonable adjournment and due notice thereof to the solicitor. This, however, is not a case of that kind.

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(1) (1863) 9 L. T. 420.

(2) (1869) L. R. 9 Eq. 137.

J. P. Eddy K.C. and *E. A. Jessel* for Ralph Wood & Co., respondents. The judge rightly declined to deal with the application to order these solicitors to pay costs personally on the alleged ground that they had been guilty of professional misconduct when on the record of the action. In the first place he had no jurisdiction to entertain the application. These solicitors ceased to be on the record on the first day of the trial and several days before this application was first made. In these circumstances they contend that the judge had no power to deal with their previous conduct while on the record or to visit them with costs, and they desire to associate themselves with the other respondent solicitor in submitting that neither on principle nor authority had the judge jurisdiction to entertain this application against the respondents. In the next place the application was not properly made, as it was not supported by affidavit. Where professional misconduct in the proceedings in an action is alleged against a solicitor the course to be taken depends upon circumstances. If the solicitor is on the record of the action an application may properly be made to the trial judge on due notice to the solicitor. If the solicitor has ceased to be on the record a substantive motion should be made to the Divisional Court on affidavit evidence. If the solicitor is not on the record an application may be made to the Law Society under the Solicitors Act, 1932, or the Court may refer the matter to the Law Society under that Act. If the solicitor has purported to act for a party without authority, a person aggrieved may bring an action against him for damages for breach of warranty of authority. In this case the proper course for the plaintiffs to take was to move the Divisional Court on affidavit. The grounds here alleged are not sufficient to support the application. It is immaterial that the respondents permitted affidavits of documents to be made from which certain books were omitted so long as there is any doubt whether the books were excluded erroneously and not fraudulently: see *In re* ————. (1) Here there is no sufficient evidence to support any of the grounds of the application.

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(1) 9 L. T. 420.

(2) (1885) 52 L. T. 706.

(3) [1892] 2 Q. B. 261.

(4) [1933] W. N. 194.

(5) 6 Dowl. P. C. 310.

SCOTT L.J. The only question upon which we have to adjudicate in this appeal is whether the trial judge, Greaves-Lord J., had jurisdiction at the close of the case after he had given judgment for the plaintiffs for 11,364*l.* damages for fraudulent share-pushing, as it is called, to inquire into and deal with an application on behalf of the plaintiffs that two firms of solicitors who had been on the record of the case as solicitors for different defendants should be ordered personally to pay the plaintiffs' costs, on the ground that they had been guilty of professional misconduct in the course of the case. [His Lordship stated the facts, and the contentions of the parties and the decision of the learned judge on the hearing of the application, and continued as follows :] Greaves-Lord J. held that he had no jurisdiction to entertain the application on two grounds.

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(1) (1861) 10 W. R. 86.

The first ground on which he refused jurisdiction was that these solicitors were no longer solicitors on the record of the case. The question of law which is raised by his refusal of jurisdiction on that ground is of very general importance. It may be thus stated: Does the jurisdiction of the judge who hears a case to exercise control over the conduct of solicitors in the case, as officers of the Court, come to an end if they cease to be the solicitors on the record before an application is made to him to exercise that jurisdiction ? It was argued, I understand, before Greaves-Lord J., and it was certainly argued before this Court, that if in the course of an action a solicitor is guilty of such conduct as would entitle the Court in the exercise of its summary jurisdiction to take disciplinary measures against him, if still on the record, by either striking him off the roll, or fining him, or ordering him to pay the costs of the party who has suffered by his misconduct, the judge has no longer jurisdiction to take that disciplinary action, if, although the solicitor was on the record and was in the opinion of the judge guilty of that misconduct, he ceases to be a solicitor on the record before the application to take that disciplinary action is made. To my mind it would be lamentable if the disciplinary power of the Court over solicitors, who have been on the record and have acted as officials of the Court, were limited in any such way. No foundation has been shown for the submission that it is so limited, and in my opinion it is not so limited.

Under the Judicature Act, 1875, the powers of the Court were preserved, although new rules were formulated, and I think it is useful to quote the decision of North J. in the case of *Gold Reefs of Western Australia, Ld.* v. *Dawson* (1), as that is a decision which explains the position under that Act. In that case the headnote is : " A company named as co-plaintiffs "in an action served notice of motion to strike out their name,

(1) [1897] 1 Ch. 115.

"and asked that the solicitors who had issued the writ might be "ordered to pay the company's costs, on the ground that their "name had been used without their authority. Before the "motion could be heard the solicitors served a notice wholly "discontinuing the action :—Held, that, notwithstanding the "discontinuance, the Court had jurisdiction to make the order "asked for." North J. said (1) : " In my opinion this motion is "properly made. It is argued that the notice of discontinuance "has put an end to the action and to the motion of which notice "had been previously served. This is a technical objection, and I "must assume that the motion is rightly made if the technical "objection can be got over. Is the objection well founded ? "Rule 1 of Order XXVI. says that on wholly discontinuing the "action the plaintiff shall pay the defendant's costs of the action ; "but it does not say in express terms that nothing else shall be "done in the action. In my opinion the discontinuance of an "action cannot have any larger effect than the dismissal of a bill "with costs under the old practice. Under that practice it was "well settled that after the dismissal of a bill with costs a person "whose name had been used as plaintiff without authority could "obtain an order to strike out his name, and that the solicitor "should indemnify him against costs. This was so under the "old practice, and it has not been in express terms altered by "rule 1 of Order XXVI. It would be surprising if such an application as this could be evaded by the solicitor's putting an end "to the action in this way. I can find nothing in the Acts or the "Rules which alters the old practice in this respect. Sect. 21 of "the Judicature Act of 1875 provides that : 'Save as by the "'principal Act or this Act, or any rules of Court, may be other-"'wise provided, all forms and methods of procedure which at the "'commencement of this Act were in force in any of the Courts "'whose jurisdiction is by the principal Act or this Act trans-"'ferred to the said High Court and to the said Court of Appeal "'respectively, under or by virtue of any law, custom, general "'order, or rules whatsoever, and which are not inconsistent with "'the principal Act or this Act, or with any rules of Court, may "'continue to be used and practised, in the said High Court of

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(1) [1897] 1 Ch. 118.

"' Justice and the said Court of Appeal respectively, in such and "' the like cases, and for such and the like purposes, as those to "' which they would have been applicable in the respective "' Courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed.' " The learned judge made the order accordingly upon the solicitors in that case.

By the Solicitors Act, 1932, s. 5, sub-s. 1, it is enacted in the proviso: " That nothing in this section shall affect the jurisdiction which, apart from the provisions of this section, is " exerciseable by the Master of the Rolls or any judge of the " High Court over solicitors." The fasciculus of sections in the Act, in which s. 5 is included, relates, it will be remembered, to the power of the Law Society to inquire into matters preliminary to striking a solicitor off the roll, and to the relevant procedure. By the provision I have just quoted the old jurisdiction of the Court over solicitors inherent in the position of a judge of the High Court is thus maintained to-day.

The case of *Simes* v. *Gibbs* (1) is a direct authority that the learned judge had jurisdiction to inquire into the matter of the application on behalf of the plaintiffs in this case. The report of the case is very short, and I will read the whole of it: " Petersdorff showed cause against a rule nisi, requiring an "attorney named Humfrey to deliver up a bill of exchange. "He objected to the entitling of the affidavit on which the rule "had been obtained, on the ground that it was entitled in the "cause out of which the alleged claim to the bill of exchange "arose. In that action judgment had been signed and execution "issued. The cause was at an end, and therefore it was improper to entitle the affidavits in that manner. They should "have been entitled 'In the matter of Humfrey.' Another "objection was, that Mr. Humfrey had ceased to be an attorney "of the Court." Patteson J.: " I think that the affidavits are "properly entitled in the cause out of which the claim to the bill "is alleged to have arisen, although that action may be at an "end. With respect to the fact of Mr. Humfrey having ceased "to be an attorney of the Court since this action arose, I do not "think that is any answer to the present application. If a man

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(1) 6 Dowl. P. C. 310.

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"be once an attorney, he cannot get rid of the summary jurisdiction of this Court with respect to what he has done while an "attorney, by ceasing to be an officer of the Court. The rule is, "once an attorney always an attorney, for that purpose. As it "appears by the affidavit, that, at the time of the transaction "out of which this application has arisen, he was an attorney "of this Court, it does not lie in his mouth to say he is not one "now." A fortiori that principle must apply where the solicitor in question has not ceased to be a solicitor, but has merely ceased to be the solicitor on the record at some stage before the application for an order that he should pay costs is made.

The case of *In re Francis Blake* (1), decided in 1860, is also in point. The headnote to the report is this: "Where an "attorney of the Court has been guilty of gross misconduct, "the Court will interfere summarily, although the misconduct "does not amount to an indictable offence, and arose in a transaction in which the attorney was not acting in that character." I need not read the detailed circumstances of that case, but there are certain passages in the judgments of the Court of Queen's Bench which are germane to the present question. Cockburn C.J. said (2): "I am of opinion that Blake is amenable to the summary jurisdiction of this Court, although the "misconduct of which he was guilty did not arise in a matter "strictly between attorney and client. I consider we are bound "to hold him thus amenable on the broad ground, that when an "attorney is shewn to have been guilty of gross fraud, although "it may not be such a fraud as may make him subject to criminal "proceedings, and although the fraud was not committed by "him while the relation of attorney and client was subsisting, "or in his character of attorney, yet, still, in such a case, where "one, who is an officer of this Court, has been guilty of gross "fraud and dishonesty, we are called upon, for the protection of "suitors and others who would give credit to him as an attorney, "to visit such misconduct with summary punishment." Wightman J. agreed, saying (2): "It is of the greatest importance that "transactions, in which attorneys are parties, should be uberrimae "fidei, and that those who are accredited as officers of the Court

(1) 30 L. J. (Q. B.) 32.

(2) Ibid. 34.

"should be above suspicion." Crompton J. said (1): "The law "as to the summary jurisdiction of the Court over its attorneys, "as laid down in the text books, is of wider extent than Mr. "Dowdeswell seems to allow." Mr. Dowdeswell was counsel in the case. "Thus, in Archbold's Practice, v. 1, page 127, it is "said: 'The Court will, in general, interfere in this summary "'way and strike an attorney off the roll, or otherwise punish "'him, for gross misconduct, not only in cases where the mis- "'conduct has arisen in the course of a suit or other regular and "'ordinary business of an attorney, but where it has arisen in any "'other matter so connected with his professional character as to "'afford a fair presumption that he was employed in or intrusted "'with it in consequence of that character.'" Blackburn J. said (1): "The jurisdiction which the Courts exercise in such "cases as the present is to ascertain whether the person accredited as an officer of the Court is unfit to be so accredited."

To-day, as we know, the ordinary procedure for striking a solicitor off the roll is laid down in the Solicitors Act, 1932; but the summary jurisdiction of the judge to inquire whether a solicitor has been guilty of misconduct in the course of a case tried before him is left unimpaired.

An illustration of that type of case is *Stephens* v. *Hill* (2), tried in 1842. The headnote to the report is: "Where an "attorney has been guilty of misconduct in the course of a "cause, the Court will grant a rule calling on him to shew cause "why his name should not be struck off the roll, even although "the matter complained of may amount to an indictable offence; "but the Court will not, under such circumstances, call upon "him to answer the matters of an affidavit." The reason for that limitation is that the answer might incriminate the solicitor, and therefore, on the recognized principle of English law that no man shall be called upon to incriminate himself, he is not to be asked to make an affidavit in answer; but the summary jurisdiction of the judge over a solicitor who has been guilty of misconduct in the course of the case is clearly recognized and laid down. It is not necessary to read the judgments in that case, because the headnote accurately

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(1) 30 L. J. (Q. B.) 35.

(2) 10 M. & W. 28.

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states their effect. In the case of *In re Hulme* (1) the headnote says: "Where an unqualified person had obtained "possession of money and documents by pretending to be a "solicitor:—Held, that the Court in the exercise of its summary "jurisdiction could order him to deliver up such money and "documents, and upon his disobedience could punish him by "attachment." There, again, is an instance of the inherent jurisdiction of the Court exercised in a summary form. Mathew J. said (2): "The Court has, in my opinion, power to "deal with the delinquent. He professed to be a solicitor, an "officer of the Court, and in that capacity obtained possession "of money and documents belonging to the applicant. On the "supposition that he was a solicitor, an order was made against "him at chambers for the delivery to the applicant of the "money and documents so obtained. He did not obey that "order, but negotiated in a manner calculated to deceive his "supposed client. An application was, in consequence, made "for leave to attach him for his disobedience, and then for the "first time it was disclosed that he was not a solicitor. *Wilton* "v. *Chambers* (3) shews that this is no answer to the order, and, "therefore, no answer to the application for an attachment for "disobedience to the order." That case is an illustration of the exercise of jurisdiction by the Court to protect its duly authorized officers, solicitors on the roll, from imposition by persons representing that they are solicitors when they are not.

In the case of *Simmons* v. *Liberal Opinion, Ld.* (4), the headnote is: "A solicitor assuming to act for one of the "parties to an action warrants his authority, and is personally "liable to the opposing party for costs, if it turns out that the "client for whom he is assumed to act is non-existing, or has "revoked the authority." In that case the defendant company did not exist. Although the jury gave a verdict for the plaintiff for 5000*l.*, there was nobody against whom the judgment could be enforced. Lord Cozens-Hardy M.R. said (5): "This is an application in the action of *Simmons* v.

(1) [1892] 2 Q. B. 261.
(2) Ibid. 261, 262.
(3) (1837) 7 Ad. & E. 524.
(4) [1911] 1 K. B. 966.
(5) Ibid. 970.

"*Liberal Opinion, Ld.* (1), and in the matter of Mr. Dunn, a "solicitor, asking that the solicitor should be ordered to pay to "the plaintiffs the costs of the action less the sum of 150*l.* "which had been received from a co-defendant, against whom "the action has been discontinued upon terms." Then: "On "November 14 the plaintiff's solicitors, Messrs. Lewis & Lewis, "wrote to Mr. Dunn a perfectly proper letter, saying that they "had made exhaustive search and could not find that there was "any such company as Liberal Opinion, Limited. That was "replied to by a letter of the 15th, which I can only describe as "impertinent and improper. It invited Messrs. Lewis & Lewis to "continue their research. The action came on for trial on January "18 and 19." Then the learned judge states the verdict and continues: "In my opinion the proceedings in the action "have been futile, and the costs incurred by the plaintiff have "been absolutely thrown away by reason of the appearance "entered by Mr. Dunn for a non-existing corporation." Then he says at the end of his judgment: "I think we have juris-"diction to order Mr. Dunn to pay the plaintiff's costs of the "action (less 150*l.*)—and that we ought to exercise this "jurisdiction."

That series of cases, in my opinion, shows that the learned judge had jurisdiction here to deal with the application made on behalf of the plaintiffs, and that he was wrong in coming to the opinion that he had no jurisdiction. The objection that the learned judge had no jurisdiction, because the solicitors had wholly or partially ceased to represent the defendants on the record before the date when the application was made that they should be ordered to pay costs, is bad.

I have been careful to express no opinion on the merits of the matter, although it is apparent from the judgment of the learned judge, which I have read, that he formed a prima facie opinion that there was serious matter for inquiry.

The other ground of objection to the jurisdiction which we were informed was taken on behalf of the two solicitors, was that under modern procedure the proper course was to make

(1) [1911] 1 K. B. 966.

some form of application before a Divisional Court upon affidavits asking for an order. What that form of application was, was not stated by counsel for the respondents ; and when I ventured to ask what was the appropriate form I could not obtain a clear answer. But in my view there is no rule of procedure which affects the judge's jurisdiction. The summary jurisdiction which he possessed over the solicitors as officers of the Court is, for the reasons I have already given, clear. I think it was for him to exercise his own discretion as to the appropriate procedure, taking care that the solicitors, who were in the position of respondents to the application, should have due notice of what the claim was against them, and sufficient opportunity to meet the claim in any way that was reasonably necessary. The form of procedure does not, however, touch the jurisdiction of the judge to hear the case ; and in my view the consideration of it does not help the respondents in their attempt to answer the appeal in this case.

The conclusion I reach is that the learned judge was wrong, that his decision must be set aside, and that the case must go back to him to be dealt with in such a manner, and according to such procedure as he thinks proper, providing, of course, that the two solicitors know what the case against them is, and have a sufficient opportunity of meeting it. Whether the learned judge should order affidavits, whether he should direct oral evidence, how far he can properly refresh his mind from his notes of the hearing of the case, and dispense with additional or new evidence to prove facts which were already established in the course of the proceedings, will all be matters for him to consider. I do not think we should say anything at all on the merits, or as to the form of procedure which the judge should adopt. I think I have given sufficient indication as to what he should do. The appeal will therefore be allowed with costs ; and, subject to anything counsel may say, the costs of the previous inquiry will be left to the discretion of the judge when he deals with the new inquiry.

SWIFT J. On October 19, 1936, Robert Edwards Harvey

Brendon and a number of other persons sued out a writ in the King's Bench Division of the High Court of Justice, in which they claimed damages for what may be comprehensively termed fraud against Stanley Grove Spiro, Maclean & Henderson (sued as a firm), S. R. Bunt & Co. (sued as a firm), Samuel Taylor, A. Graham, William Underhill, and the Scottish Gas Utilities Corporation, Ld. [His Lordship stated the facts, including the dates of appointment and retirement from the record of the case of the respective respondent solicitors, the dates of the beginning and end of the trial of the action, the application for an order that the respondent solicitors should personally pay the costs payable by the parties for whom they had acted, and the hearings of that application by the judge, and continued as follows:] The learned judge, having listened for some time to the application, then had submitted to him on behalf of the respondent solicitors two propositions, which have also been submitted to this Court.

One of these propositions was that the application was in the nature of a motion which ought to have been supported by an affidavit. It is again said before us here and now that the application was insufficient because it was not supported by an affidavit. It has been solemnly argued in this Court that this is a notice of motion, and that the notice of motion can only be supported by an affidavit verifying the facts upon which it is based. I very much doubt whether this is a notice of motion. In any case I am quite certain that no notice of motion was necessary. All that was required to be done was what was done. An application was made to the learned judge in open Court, and it was unnecessary that that application should be supported by any affidavit.

The other proposition was that the judge had no jurisdiction to deal with these two solicitors because they were not, during the latter part of the proceedings, solicitors on the record; the truth being that Mr. Griffiths had ceased to be on the record in this action of *Brendon* v. *Spiro* on February 18 and that Messrs. Ralph Wood & Co. had ceased to represent the Scottish Gas Utilities Corporation on February 22, because the Scottish Gas Utilities Corporation had died; and on February 25, which was the end of the first day of the trial, Messrs. Ralph Wood & Co. had ceased to represent Maclean & Henderson, although they continued to represent Underhill. It was said that as these solicitors had gone from the record, or have gone from the record in so far as any allegation of impropriety was made against them, the Court has no jurisdiction to deal with them. Having heard that argument presented to him, as I have no doubt it was presented most attractively, by Mr. Burrows and Mr. Eddy, the learned judge accepted the contention which they made to him, and in my opinion he accepted it wrongly. I do not think that the Court loses its inherent jurisdiction to control its officers, amongst whom solicitors are to be numbered, merely because, after they have done something which it is alleged they ought not to have done, they have ceased to be either officers of the Court altogether, or officers concerned in the particular matter with which they were dealing. My Lord has referred to, and indeed has read, the case of *Simes* v. *Gibbs* (1), which is of no less authority than at first because it is now ninety years old. To my mind that case is conclusive of this matter. There have been many subsequent occasions, as appears from the cases to which my Lord has called attention, in which the disciplinary power of the Court over attorneys and solicitors has been considered; but the judgment of Patteson J. in the case which I have mentioned has never been assailed, and to my mind it expresses exactly what is the law to-day. Adopting that decision and following it, convinced that it is right, I have come to the conclusion that Greaves-Lord J. erred when he said that he had no jurisdiction, and I think the matter must go back to him in order that, with that erroneous impression removed from his mind, he may deal with this case upon its true merits.

He has said there is something to be inquired into. I believe from reading his judgment that he has not inquired into it. He did not conclude his inquiry. He saw enough to make him think there was something to be inquired into; and

(1) 6 Dowl. P. C. 310.

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then he thought he was barred from holding the inquiry. In the opinion of this Court he was not so barred, and he should hold the inquiry which he thinks ought to be held. How he will do it is to my mind entirely a matter for him. I agree with my Lord that it is not for us to lay down the procedure which he should adopt. It may be that he knows from what he heard in the course of the case all that he wants to know to enable him to come to a determination which in his opinion is a just and proper one. It may be that he will think it right that the contending parties should come before him and tender their oral evidence. It may be that he will require affidavits to be made by one side or the other. Those are all matters for him. All I know is that there ought to be an inquiry; and that the learned judge who tried the case, and to whom the application was made, is the proper person to make that inquiry. I, therefore, agree with my Lord that this appeal should be allowed, and that the case should go back to be dealt with according to the law.

Appeal allowed. Case remitted.

Solicitors for appellants: *Smith & Hudson, for T. R. McCready, Plymouth.*

Solicitor for respondent Griffiths: *T. Griffiths.*

Solicitors for respondents Ralph Wood & Co.: *Ralph Wood & Co.*

J. R.

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April 6, 7;
May 3.

MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY, LIMITED *v.* DAVIES AND ANOTHER.

SAME *v.* SAME.

SAME *v.* SAME.

[1936. M. 1004.]

Insurance (motor)—Policy—Alleged non-disclosure by insured of previous convictions—Action by insurer for declaration of right to avoid policy on that ground—Defence that insurer has issued other policies notwithstanding disclosure of similar convictions — Competence of defence—Right of defendant to discovery of documents relating to such other policies—Road Traffic Act, 1934 (24 & 25 *Geo.* 5, *c.* 50), *s.* 10, *sub-ss.* 3, 5.

The Road Traffic Act, 1934, s. 10, after making provision that an insurer shall, subject to the section, pay to the persons entitled to a judgment against the insured in respect of a liability covered by the policy, any sum payable thereunder, goes on to provide: "(3.) No sum shall be payable by an insurer under the foregoing "provisions of this section, if, in an action commenced before, or "within three months after, the commencement of the proceedings "in which the judgment was given, he has obtained a declaration "that, apart from any provision contained in the policy, he is "entitled to avoid it on the ground that it was obtained by the "non-disclosure of a material fact . . . . (5.) In this section the "expression 'material' means of such a nature as to influence the "judgment of a prudent insurer in determining whether he will "take the risk . . . ."

The plaintiffs, a motor insurance company, issued a policy to the defendant D. covering liability to third parties by accident caused in connection with a certain motor-cycle. During the currency of the policy, D., while riding the motor-cycle, was involved in an accident which resulted in injuries to the defendant O. entitling him to claim damages from D. The plaintiffs, in order to get the benefit of sub-s. 3, set out above, brought an action against D. and O. claiming a declaration that the plaintiffs were entitled to avoid the policy on the ground that it had been obtained by non-disclosure of material facts, namely, two previous convictions of the defendant D. for driving a motor-car without a licence and for driving a motor-cycle in a dangerous manner, respectively. The defendants in their defences denied the materiality of these undisclosed convictions. The defence of the defendant O. contained an allegation that the plaintiffs had not refused the risk in cases similar to that of the defendant D. where disclosure of the facts had been made to them. The plaintiffs made an application for an order striking out the above-mentioned allegation in the defence of the defendant O. Each of the defendants, desiring to show that the undisclosed convictions were not "material" facts within the meaning of sub-ss. 3 and 5 of s. 10, made an application for an order for discovery by the plaintiffs of all documents in the possession of the plaintiffs relating to proposals for motor insurance made to them by persons disclosing the fact of a previous conviction of any such person similar to either of the above-mentioned convictions of the defendant D.:—

Held, by the Court of Appeal: (1.), reversing on this point the order of Goddard J., that the application of the plaintiffs to strike out the said allegation in the defence of the defendant O. should be granted, on the ground that that allegation amounted to no more than a pleading of evidence.

(2.), affirming on this point the order of Goddard J., that the application of each of the defendants for the discovery desired should be refused, inasmuch as documents tending to show that the plaintiffs, as insurers, had not regarded the previous conviction of an insured person as a material fact preventing them from accepting the risk, in a case where that conviction had been fully disclosed to them at the time of the proposal for insurance, would not be relevant evidence to show that a similar conviction was not a "material" fact within the meaning of sub-ss. 3 and 5, in a case, such as the present, in which the conviction had not been disclosed to the insurer.

APPEALS from three orders of Goddard J.

A policy of motor insurance dated June 28, 1935, and issued by the plaintiffs, the Merchants' and Manufacturers' Insurance Co., Ld., to the defendant, R. G. Davies, after reciting that the insured by a proposal which was to be the basis of the contract in the policy and was deemed to be incorporated therein had applied to the company for the insurance thereinafter contained and had paid or agreed to pay the premium stated therein as consideration for the insurance, witnessed (inter alia) that in respect of liability to third parties the company would indemnify the insured in the event of accident caused by or through or in connection with a certain motor-cycle against all sums which the insured should become legally liable to pay in respect of death or bodily injury to any person except as therein mentioned, provided always that the truth of the statements and answers in the said proposal should be conditions precedent to any liability of the company under the policy.

On July 14, 1935, during the currency of the policy, the defendant Davies while riding the motor-cycle was involved in an accident whereby injury was done to the defendant W. D. Owen, who was in a position to make a claim for damages against the defendant Davies.

On March 20, 1936, the plaintiffs, in order to obtain the benefit of the Road Traffic Act, 1934, s. 10, sub-s. 3 (1), brought the present action against the defendants Davies and Owen, notice of the action being given to the latter, claiming by their writ of summons a declaration that they were entitled to avoid the policy apart from any provision contained therein, on the ground that it had been obtained by non-disclosure of a material fact or facts or by representation of fact or facts which were false in some material particular.

The plaintiffs, in their amended statement of claim, alleged (inter alia) (para. 2) that by the above-mentioned accident injury was done to the defendant Owen and claims had been or would be made against the defendant Davies in respect thereof; (para. 3) that the plaintiffs were induced to grant a policy, and the policy was within the meaning of the above mentioned subsection obtained, by non-disclosure by the defendant Davies of facts material to be known by the plaintiffs, or representation of facts which were false in material particulars, the particulars of non-disclosure being that the defendant Davies failed to disclose that on April 1, 1931, he had been convicted and fined 10*s.* for driving a motor-car without a licence, and that on February 18, 1932, he had been convicted and fined 3*l.* 2*s.* 6*d.* (including costs) and his driving licence had been endorsed for driving a motor-cycle in a dangerous manner, and the particulars of misrepresentation being that in a written proposal dated June 24, 1935, signed by the defendant Davies and submitted by him to the plaintiffs (being the above recited proposal) in reliance whereon they granted the policy, in reply to the question, "Have you ever "been convicted of an offence in connection with the driving of "a motor vehicle or motor-cycle? If so, please give details," the defendant Davies answered "1 without tail lights," whereas in truth he had in addition been convicted and fined and had his licence endorsed as hereinbefore set out; (para. 4) that in the premises the plaintiffs were entitled to avoid and had avoided, or in the alternative were entitled to avoid, the policy, and were under no liability to afford the defendant Davies indemnity as provided by the policy; and the plaintiffs claimed the declaration above mentioned.

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(1) The provisions of the section so far as material are set out below in the judgments of the Court.

The defendant Davies (1) in his defence stated (inter alia) (para. 2) that he admitted that he had been convicted and fined as alleged, that he had omitted to disclose that fact to the plaintiffs, and that he answered the question in the proposal as alleged; and that he denied that the plaintiffs were induced to grant the policy, and that the policy was within the said sub-section obtained, by non-disclosure of the said facts or by the said misrepresentation; and that he would contend that neither that non-disclosure nor that misrepresentation was of facts which were material within s. 10, sub-s. 5, of the Act of 1934.

The defendant Owen in his defence stated (inter alia) (para. 2) that he denied that the plaintiffs were induced to grant the policy or that the same was obtained by the alleged or any non-disclosure by the defendant Davies or by the alleged or any misrepresentation; (para. 4) that the defendant Owen denied that the facts referred to in para. 3 of the amended statement of claim were facts material to be known as defined in the Act of 1934, or that the plaintiff in granting the policy relied upon the said representation. Para. 4 of the defence continued as follows:—"In cases similar to that of the "defendant Davies where disclosure of the facts has been made "to them, the plaintiffs have neither refused the risk nor "attached any conditions to the policy: (Particulars here-"under cannot be given until after discovery)."

The plaintiffs delivered to each of the defendants a list of documents in their possession relating to the case.

The plaintiffs gave notice dated March 12, 1937, of an interlocutory application to the commercial judge for an order that the second and third sentences of para. 4 of the defence of the defendant Owen might be struck out as not alleging facts material to the issues involved in the action.

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(1) This defendant was a minor and he appeared by the official solicitor as his guardian ad litem.

Each of the defendants gave notice of an interlocutory application to the judge for an order directing the plaintiffs to file a further and better affidavit of documents disclosing "correspondence, documents or files which are or have been "in their possession, custody or power relating to policies which "have been granted or refused by the plaintiffs, where dis-"closure has been made of similar convictions as mentioned "in para. 3 of the statement of claim herein."

On March 17, 1937, the three applications came before Goddard J., who on each application made an order dismissing it but giving leave to appeal.

The plaintiffs and each of the defendants appealed. The appeal was heard on April 6 and 7, and judgment was given on May 3, 1937.

Fox-Andrews and *Stephen Chapman* for the defendant Owen. Goddard J. was right in dismissing the application of the plaintiffs for an order striking out the statement in the defence of this defendant to the effect that in cases similar to that of the defendant Davies, where disclosure of the facts had been made to them, the plaintiffs had not refused the risk; but the learned judge was wrong in dismissing the application of this defendant for an order for discovery of documents in the possession of the plaintiffs relating to cases where disclosure may have been made to the plaintiffs of similar convictions to those mentioned in para. 3 of the statement of claim. It is true that the Road Traffic Act, 1934, s. 10, (1) provides by sub-s. 3 for an insurer obtaining a declaration that he is entitled to avoid the policy on the ground that it was obtained by non-disclosure of a material fact; and, by sub-s. 5, that in the section "material" means of such a nature as to influence the judgment of a prudent insurer. These provisions make a particular application to motor insurance cases of the general principle expressed in the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 18, which provides by sub-s. 1 that the assured must

(1) The provisions of the section so far as material are set out below in the judgments of the Court.

disclose to the insurer every material circumstance which is known to him; and by sub-s. 2 that every circumstance is material which would influence the judgment of a prudent insurer; the principle there expressed being applicable to all classes of insurance business: see per Scott L.J. in *Locker & Woolf, Ld.* v. *Western Australian Insurance Co., Ld.* (1) and see also Arnould on Marine Insurance, 11th ed., vol. i., p. 822. In the present case the plaintiffs allege that the two previous convictions of the defendant Davies referred to in the particulars under para. 3 of the statement of claim were "material" facts within the meaning of s. 10, sub-ss. 3 and 5, of the Act of 1934, and that the policy was obtained by non-disclosure of these facts contrary to sub-s. 3 thereof. This defendant submits that, if in other cases similar to that of the defendant Davies where previous convictions of the insured had been disclosed to the plaintiffs they nevertheless issued policies, they cannot be heard to say either that the previous convictions of Davies were material facts or that it was by non-disclosure of these convictions that this policy was obtained. If there have been such other cases they are relevant to the present case, and the defendant is therefore entitled to rely upon them in evidence and to plead them by way of a defence, and for these purposes to obtain discovery from the plaintiffs of all documents relating to them.

[SLESSER L.J. It would seem that the form of the defendants' applications is too wide, and that it should be limited to cases in which the convictions were in terms the same as those of the defendant Davies.]

[The defendants' applications were by leave modified accordingly, the form as modified being set out below in the judgments of the Court.]

The defendant is entitled to discovery of documents relating to cases coming within the modified form of application.

[SLESSER L.J. By s. 10, sub-s. 5, of the Act of 1934 a fact is material for the purposes of the section where it is such as to influence the judgment of a prudent insurer; and expert evidence can no doubt be brought to show whether or not a fact is material in this sense: see *Ionides* v. *Pender* (2) and

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(1) [1936] 1 K. B. 408.

(2) (1874) L. R. 9 Q. B. 531.

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Thames and Mersey Marine Insurance Co., Ld. v. "*Gunford*" *Ship Co., Ld.* (1) In the present case, however, the defendant is not seeking to bring expert evidence to show that the convictions, if disclosed, would not influence a prudent insurer, but is only seeking to obtain evidence that they have not influenced a particular insurer, namely, the plaintiffs.]

In the cases cited the judges would appear to be referring to facts influencing the mind, not of a prudent insurer, but of a particular insurer. In any case, evidence that a fact has not influenced a particular insurer is evidence tending to show that it cannot be material.

Theodore Turner for the defendant Davies. This defendant desires to adopt the argument which has been advanced on behalf of the defendant Owen. The provisions of s. 10, sub-ss. 3 and 5, of the Act of 1934 in regard to a material fact must have reference to some particular point of time at which the materiality of the fact is to be determined, and it is submitted that the point of time contemplated is that at which the proposal for the policy is presented. The question is whether the fact is material at that point of time. Supposing that at the time when this defendant presented his proposal for a policy he had disclosed these two previous convictions to the plaintiffs, who must be presumed to be prudent insurers, these convictions would not have been a "material" fact within the meaning of s. 10, sub-s. 5, influencing the judgment of the plaintiffs to refuse the policy, if the plaintiffs had already issued policies to other persons whom they knew to have been previously convicted; and, that being so, the defendant's non-disclosure in his proposal of these convictions cannot have been the cause of his having obtained his policy from the plaintiffs. If, by reason of such other policies having been granted by the plaintiffs, this defendant's convictions were not material facts at the time when the defendant's policy was granted to him, the subsequent discovery that these convictions were not disclosed at that time cannot make them material facts. In view of these considerations such other policies if they exist are relevant to the issue whether the defendant's convictions were material facts, and he is therefore entitled to bring evidence of any such other policies and for that purpose to obtain discovery from the plaintiffs of any documents in their possession relating to such other policies. These documents would prove that previous convictions did not influence the judgment of one insurer, namely, the plaintiffs, and that would be a step towards showing that they would not influence the judgment of a prudent insurer and so would not be "material" within sub-s. 5.

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(1) [1911] A. C. 529, 533, 550.

[SLESSER L.J. The obligation on a person making a proposal for insurance to disclose all material facts extends to any matter which would influence the judgment of the insurer: *Locker & Woolf, Ld.* v. *Western Australian Insurance Co., Ld.* (1) Though a previous conviction may not have influenced the mind of an insurer in one case, it does not follow that it might not influence his mind in the different circumstances of another case.]

F. Soskice for the plaintiffs. The plaintiffs' application to strike out the statement in the defence of the defendant Owen that in similar cases to that of the defendant Davies the plaintiffs had not refused the risk should be allowed; and the defendants' applications for further discovery of documents should be refused.

[GREENE L.J. This is an action for a declaration under s. 10 of the Act of 1934, and the issues are, first, whether the two convictions of the defendant Davies were material facts within sub-ss. 3 and 5 of that section; and, secondly, whether it was by non-disclosure of these convictions that the defendant Davies's policy was obtained. In order to succeed in the action it would seem that the plaintiffs must establish the affirmative of both these issues.]

In order to answer the first of these questions, namely, whether the said convictions were a material fact for the purposes of s. 10, it is important to keep in view the definition of "material" in sub-s. 5 of that section—"of such a nature "as to influence the judgment of a prudent insurer in determining "whether he will take the risk." It is necessary to consider

(1) [1936] 1 K. B. 408, 414, 415.

whether the fact in question is of such a nature as to influence the judgment not of any particular insurer, but of a prudent insurer: see per Swift J. in *Locker & Woolf, Ld.* v. *Western Australian Insurance Co., Ld.* (1) It is not disputed that expert evidence can be given as to whether a fact is of such a nature as to influence the judgment of a prudent insurer, but the evidence of a particular underwriter would not be admissible on that question, unless he were claiming to be an expert witness. The defendants by their applications are asking for discovery of documents relating to facts which may have influenced a particular insurer only, namely, the plaintiffs. Documents tending to show that an insurer had not regarded a previous conviction as a material fact in a case where that conviction had been fully disclosed to him, would not be relevant evidence to show that he did not regard a previous conviction as a material fact in a case in which that conviction had been concealed from him. Under R.S.C., Order XXXI., r. 19A, sub-r. 3, the defendants are only entitled to an order for further discovery of documents on an affidavit stating that in their belief the plaintiffs have in their possession some particular document or documents or classes of document, and that these documents relate to the matters in question in the action. The defendants' applications fail to comply with that rule inasmuch as they are not supported by the required affidavit. The affidavit of documents already filed by the plaintiffs is conclusive, unless the defendants can satisfy the Court that there are good grounds for believing that the plaintiffs have other relevant documents in their possession. It would be oppressive to order the plaintiffs to search their files for documents which may not be in existence. Goddard J. in the exercise of his discretion has made an order refusing the discovery asked for and that should be regarded as final.

The plaintiffs' application to strike out the last sentences in para. 4 of the defence of the defendant Owen should be allowed on grounds similar to those on which it has been contended that the applications of the defendants should be refused. That defendant, in that part of his defence, is pleading evidence, which is not permissible.

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(1) (1935) 52 Ll. List Rep. 325; affirmed [1936] 1 K. B. 408.

Chapman replied.

1937. May 3. The following judgments were read :

Sir Wilfrid Greene M.R. (1) These appeals arise in the following circumstances :—The action is brought by the plaintiffs, who ask for a declaration that they were or are entitled to avoid a certain policy of assurance apart from any provision contained therein on the ground that it was obtained by non-disclosure of material facts ; or by a representation of facts false in some material particulars. The policy in question had been issued to the defendant Davies ; and it extended to cover, among other things, liability for injury to third parties by an accident caused by, through or in connection with a motor-cycle described in the policy. During the currency of the policy the defendant Davies, while riding the motor bicycle, was involved in an accident which resulted in injuries to the defendant Owen, who is in a position to make a claim for damages against the defendant Davies.

In these circumstances the plaintiffs, in order to obtain the benefit of s. 10, sub-s. 3, of the Road Traffic Act, 1934, began this action, and in their statement of claim they allege that they were induced to grant the policy, and that the policy was obtained, by non-disclosure of material facts, or representation of facts false in material particulars. The non-disclosure alleged is the non-disclosure of two convictions which had been suffered by the defendant Davies, namely, (*a*) a conviction on or about April 1, 1931, for driving a motor-car without a licence, for which offence he was fined 10*s.* ; (*b*) a conviction on or about February 18, 1932, for driving a motor-cycle in a dangerous manner, for which offence he was fined a sum amounting with costs to 3*l.* 2*s.* 6*d.*, and his driving licence was endorsed. The misrepresentation alleged is that in answering a question as to convictions for motoring offences contained in the proposal form the defendant Davies stated that his only conviction was for driving without tail lights. These appeals are concerned only with the question of non-disclosure of material facts.

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(1) Since the conclusion of the argument his Lordship had been appointed Master of the Rolls.

In their defences the defendants deny the materiality of the facts alleged not to have been disclosed. Para. 4 of the defence of the defendant Owen contains the following allegation: " In cases similar to that of the defendant Davies where disclosure of the facts has been made to them the plaintiffs "have neither refused the risk nor attached any special conditions "to the policy (particulars hereunder cannot be given until "after discovery)."

After the plaintiffs had delivered a list of documents, interlocutory applications were made in the action by each defendant asking for an order on the plaintiffs to file a further and better list of documents disclosing " correspondence, "documents or files which are or have been in their possession, "custody or power, relating to policies which have been granted "or refused by the plaintiffs where disclosure has been made of "similar convictions as mentioned in para. 3 of the statement of "claim herein." The plaintiffs on their side made an application for an order striking out the words in para. 4 of the defence of the defendant Owen set out above. All three applications were dismissed by Goddard J., who gave leave to appeal.

The relevant provisions of the Road Traffic Act, 1934, are contained in sub-ss. 3 and 5 of s. 10 of that Act, and are as follows: " (3.) No sum shall be payable by an insurer under the "foregoing provisions of this section, if, in an action commenced "before, or within three months after, the commencement of the "proceedings in which the judgment was given, he has obtained "a declaration that, apart from any provision contained in the "policy, he is entitled to avoid it on the ground that it was "obtained by the non-disclosure of a material fact, or by a "representation of fact which was false in some material "particular, or, if he has avoided the policy on that ground, "that he was entitled so to do apart from any provision contained in it." " (5) In this Section the expression 'material' "means of such a nature as to influence the judgment of a "prudent insurer in determining whether he will take the risk, "and, if so, at what premium and on what conditions."

I am prepared to assume for the purposes of this appeal that in ascertaining the "materiality" of any fact evidence as to the practice of prudent insurers will be admissible at the trial. On this basis the defendant Owen seeks to justify the insertion of the sentence in para. 4 of his defence set out above. But that sentence at the highest amounts to pleading evidence of want of materiality and nothing more, and in my opinion ought to be struck out. Indeed, counsel for the defendant Owen made no serious attempt to justify its insertion except as bringing out the point which he wishes to make in the matter of discovery; a point, however, which remains open to him in view of his denial of the materiality of the facts alleged not to have been disclosed.

The argument upon which the applications for further discovery are based is to the following effect: It is said that the materiality of the facts in question will be an issue at the trial; that upon that issue the practice of prudent insurers in dealing with cases where applicants for insurance have suffered similar convictions will fall to be considered; that in this connection the practice of the plaintiffs themselves may be examined; and that relevant evidence of their practice will be found in the documents discovery of which is sought by the defendants. With regard to those documents, counsel for the defendants asked leave to amend their applications by describing the documents discovery of which is sought as those "relating to proposals or applications for insurance "of motor-car and motor-cycle risks made to them by persons "disclosing the fact that they have been once convicted of "driving a motor-car or motor-cycle without a licence and once "convicted of driving a motor-car or motor-cycle in a dangerous "manner or of one or other of such offences."

It is said on behalf of the defendants that we ought to reverse the decision of the learned judge, upon the ground that his discretion was not properly exercised and that in view of the argument summarized above he ought to have made the order. I am unable to adopt this view. It appears to me that the learned judge was perfectly entitled to take the view which he did take upon this matter. The mere fact—and it is only this fact that the defendants hope to establish by this discovery—that the plaintiff company, in cases where convictions of the same character (but not necessarily accompanied by the same punishments) as those now in question had been disclosed to them by applicants for insurance, did not decline the risk or raise the premium, would not in my judgment advance the defendants' case to any such material extent as to compel the Court to make what would be a novel and oppressive order. There appears to me to be all the difference in the world between a case where an underwriter accepts a risk after receiving full information as to previous convictions, and may well be willing to issue a policy to an applicant who makes a frank disclosure, and the case where no disclosure is made. Underwriters may well regard as material a fact which is concealed from them, and at the same time be prepared to disregard it if a frank disclosure is made; proof that the plaintiffs had adopted the latter course in certain cases would by itself in my judgment lead nowhere. If discovery had been asked, or could have been asked, of documents relating to cases where the plaintiffs after discovering the existence of similar convictions which an applicant had failed to disclose, nevertheless decided to issue a policy on ordinary terms, the position might have been different; but obviously an application for discovery of this kind could only be made if supported by an affidavit under Order XXXI., Rule 19A, sub-r. 3, a thing which it is not suggested could be done in the present case.

In the result the appeal, so far as it relates to the application to strike out the paragraph in the defence of the defendant Owen, succeeds with costs; and the appeals of the defendants are dismissed with costs.

Slesser L.J. In this action the plaintiffs, the Merchants' and Manufacturers' Insurance Company, Ld., seek a declaration that they are entitled to avoid a policy of insurance, dated June 28, 1935, issued by them to the defendant Davies, on the ground that it was obtained by non-disclosure of a material fact, or representation of facts which were false in some material particular. The second defendant, Owen, who alleges that injury was done to him by the defendant Davies when driving a motor-cycle and that claims have been or will be made against the defendant Davies, also opposes the declaration.

The declaration which is asked by the insurance company is one which arises under s. 10, sub-s. 3, of the Road Traffic Act, 1934, which provides that " no sum shall be payable by "an insurer under the foregoing provisions of the section if in "an action commenced before or within three months after the "commencement of the proceedings in which the judgment was "given he has obtained a declaration that apart from any "provision contained in the policy he is entitled to avoid it on "the ground that it was obtained by the non-disclosure of a "material fact or by representation of fact which was false in "some material particular." By s. 10, sub-s. 5, of the same Act it is provided that : " The expression ' material ' means "of such a nature as to influence the judgment of a prudent "insurer in determining whether he will take the risk and if "so at what premium and on what conditions."

The present appeal is from an order of Goddard J. refusing an application by the defendant Davies to order the plaintiffs to file a further and better list of documents. This application now takes a form which has been modified during the appeal as a consequence of criticism from the Court of the original form. The application on which the appeal is now solely based is as follows : " That the plaintiffs do within —— days file a "further and better list of documents disclosing all documents "which are or have been since 1st January 1935 in their possession custody or control or in the possession, custody or control "of their agents, relating to proposals or applications for "insurance of motor-car and motor-cycle risks made to them "by persons disclosing the fact that they have been once "convicted of driving a motor-car without a licence and once "convicted of driving a motor-cycle in a dangerous manner."

It is contended by the appellants that under the general principles which govern discovery of documents, the above

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discovery is justified upon the general ground that the documents sought are relevant in that they directly or indirectly enable the appellant to advance his own case or destroy that of his adversary, or may fairly lead him to a train of inquiry which may have either of these consequences; and generally that the documents sought are such as would throw light on the case. In my view this contention is not well founded. The alleged facts of this case, as they appear in the statement of claim under particulars of misrepresentation, are that the defendant Davies in a proposal submitted to the plaintiffs, in reliance whereon they granted such policy, in reply to the question: "Have you ever been convicted of an "offence in connection with the driving of a motor-vehicle or "motor-cycle," wrote in answer: "Once; without tail lights"; whereas in truth he had been convicted and fined on April 1, 1931, for driving a motor-car without a licence and on February 18, 1932, convicted and fined 3*l.* 2*s.* 6*d.* (including costs) and his driving licence endorsed for driving a motor-cycle in a dangerous manner.

One of the issues to be determined in the action is whether, in order to satisfy s. 10, sub-s. 3, of the 1934 Act, the policy may be avoided on the ground that it was obtained by the non-disclosure of a material fact; and that means, as I have pointed out, according to sub-s. 5, of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions. It is said that documents relating to proposals or applications for insurance of motor-cars and motor-cycle risks made to the plaintiffs by persons disclosing the fact that they have been once convicted of driving a motor-car without a licence and once convicted of driving a motor-cycle in a dangerous manner will be material to show that such disclosures have not been deemed to be material by one insurer, at any rate, namely, the plaintiffs. But, in my opinion, the facts contemplated to be disclosed by such discovery are essentially different from those of the present case—for in the present case it is not suggested that there has been acceptance of policies after such disclosure, but an acceptance brought about by non-disclosure: and though it might well be that in appropriate cases the knowledge of particular circumstances affecting acceptance might be material, for it has been decided that on such a question of fact expert evidence may be given: (See *Thames and Mersey Insurance* case (1) per Lord Alverstone C.J. (2) and per Lord Robson (3); and *Ionides* v. *Pender* (4)) having regard to all the circumstances of this case, in which it is said that there has been concealment, or non-disclosure of facts, I do not think that the discovery of instances where there has been complete disclosure and no concealment is in any way either conclusive or relevant.

The factor of the moral hazard involved in the fixing of a premium, or determining whether an insurer would take a risk, where the proposer has concealed or mis-stated the facts as to previous conviction, more particularly when full details are asked as in Proposal Form 3B, is a circumstance which must be considered in relation to the materiality of the non-disclosure; and it may well be that an insurer who would accept a policy when a previous conviction has been disclosed, which is the contingency contemplated in the discovery here sought, would refuse to complete such a policy after a proposal had been made where the insurer subsequently discovered that a non-disclosure of conviction or other material matter had occurred.

On the ground, therefore, that the discovery sought is not relevant to the issue raised in the circumstances of the case, I agree that the order desired by the defendants was rightly refused, and that this appeal fails.

Defendants' appeals dismissed.
Plaintiffs' appeal allowed.

Solicitors for defendant Owen: *Vizard, Oldham, Crowder & Cash, for Roberts & Mathias, Narberth.*

Solicitor for defendant Davies: *The Official Solicitor.*

Solicitor for plaintiff company: *William Charles Crocker.*

(1) [1911] A. C. 529.
(2) Ibid. 533.
(3) Ibid. 550.
(4) L. R. 9 Q. B. 531.

J. R.

Followed. Pearson *v.* Lambeth B.C. [1950] 2 K. B. 353

C. A.

1937
June 24, 25.

ELLIS *v.* FULHAM BOROUGH COUNCIL.

[1936. E. 1464.]

Negligence—Public park—Paddling pool—Sand placed at side of pool—Piece of glass in sand—Child paddling in pool cut by glass—Knowledge of local authority of possible danger to children—Inadequate measures to remove danger—Liability of local authority—Child invitee or licensee.

A local authority provided a public park for the use of the inhabitants of the district. In this park was constructed a paddling pool for children to paddle in, and loads of sand were put at the side of the pool to give the appearance of the seaside. The local authority affixed a notice to a board near the pool stating that "Owing to the risk of cut feet, persons must not "take into the paddling pool any bottles, tins or other sharp "materials." They also provided park-keepers, who, under instructions, raked the pool every morning; but the rake used would not go into the sand but only over the surface, so that anything embedded in the sand would not be disclosed by the rake. The plaintiff, a little boy who paddled in the pool, had his foot cut with a piece of glass embedded in the sand. A short time previously another little boy had his foot also cut in the same pond to the knowledge of the park-keeper. In an action for personal injuries Greaves-Lord J. held that the plaintiff was an invitee and that the local authority were liable to him for the injuries. On appeal:—

Held, that, on the assumption that the plaintiff was only a licensee, nevertheless the local authority were liable, as they knew that there was a possible danger to children paddling in the pool through articles in the pool and took measures to remove such articles, but that such measures were inadequate.

Per Slesser and MacKinnon L.JJ. that persons who entered a public park provided by a local authority were only licensees and not invitees.

Appeal from a decision of Greaves-Lord J.

The Fulham Borough Council were the owners and occupiers of a park, known as Bishop's Park, which they had provided for the use of the inhabitants of the borough of Fulham. In this park the council had constructed and maintained a pool or pond for the use of children. This pool was called "New "Brighton," and in order to make things look real the borough council had loads of sand brought from the seaside and put at the side of the pool to give the appearance of the seaside and to provide the attraction of playing in the sand. The pool was constructed in the form of a saucer and was in no place deep, the depth in the centre not exceeding two feet. It was designed for the purpose of attracting the children who used the park to paddle in it.

On August 19, 1936, a little boy, named Albert Ellis, went to the park and paddled in the pool and played in the sand. While he was in the pool he stepped upon a piece of glass and cut the great toe of his left foot rather seriously, severing the main ligament of the great toe. The boy was attended to first by one of the persons in charge of the pool and afterwards was taken to hospital, where the wound was dressed. The boy's brother afterwards went into the pond and found the piece of glass.

The boy, Albert Ellis, suing by his next friend, brought an action against the Fulham Borough Council to recover damages for his personal injuries, alleging that the injuries had been caused by the negligence and/or breach of duty by the defendants and their servants in that they had failed to take reasonable care to ensure that the pond or pool was safe for children to paddle therein, and free from such objects as broken glass which would make paddling therein unsafe for children. By his particulars he alleged that the defendants were negligent in that they permitted broken glass to lie at the bottom of the pool and thereby created a danger or trap to the infant plaintiff of which they knew or ought to have known, and that the defendants failed to give warning that the pool contained in it broken glass, and that the defendants failed to take adequate precautions to prevent the piece of glass from remaining in the pool and failed to take adequate steps to remove the same therefrom.

The defendant council by their defence denied that they had been negligent or that they had committed any breach of duty as alleged.

The borough council made by-laws for regulating the use of the park. They also affixed a notice to a board near the pond stating that " Owing to the risk of cut feet, persons must "not take into the paddling pool any bottles, tins or other sharp "materials." They also provided certain park-keepers who were given certain instructions. Every morning a man raked the bottom of the pond with a rake. This rake would not go into the sand at the side of the pond but only on the top of the sand, so that if anything got embedded in the sand the rake would not disclose it, but only anything that was lying on the surface of the sand. The park-keepers were instructed that if a subordinate park-keeper found out that a child had been cut and it was suspected that the cut had been incurred through some sharp substance in the pond the subordinate park-keeper should report the matter to the uniformed park-keeper, who was given a discretion whether or not he would report the matter further.

A few days before the accident to the plaintiff another little boy was injured in the pond close to the place where the plaintiff was injured. That occurrence was reported to the subordinate park-keeper, who, however, disregarded the instructions he had received and did not report the matter to the uniformed park-keeper.

Greaves-Lord J. held that the infant plaintiff was an invitee, that the presence of the piece of glass in the pond was a hidden danger of which the defendants ought to have known, and would have known if their servants had done their duty; that the rake which the defendant council provided, though sufficient for the purpose of raking the bottom of the pond where there was no sand, was useless for the purpose of ascertaining whether there was anything embedded in the sand; that the defendant council did not provide proper supervision over the park-keepers; they gave instructions which, if they had been carried out, might have avoided the accident. Those instructions, however, were not carried out, and the not carrying out of those instructions was negligence on the part of the borough council's servants. The borough council therefore did not exercise that reasonable care which they should have exercised towards a child whom they invited to the pond, and were therefore liable to the plaintiff. The learned judge gave judgment for the infant plaintiff for 50*l.* in addition to 19*l.* 10*s.* 6*d.* for special damages.

The Fulham Borough Council appealed. The appeal was heard on June 24 and 25, 1937.

Macaskie K.C. and *Granville Sharp* (*Willard Sexton* with them) for the appellants. The learned judge was wrong in holding that the plaintiff was an invitee; he was only a licensee. The distinction between the two classes was established in *Indermaur* v. *Dames* (1), where it was laid down by Willes J. that the duty of an occupier of premises towards an invitee is to protect him from some unusual danger of which the invitee does not know but of which the occupier knows or ought to know. Hamilton L.J. in *Latham* v. *R. Johnson & Nephew, Ld.* (2), said: "The rule as to licensees, too, is that "they must take the premises as they find them apart from "concealed sources of danger; where dangers are obvious they "run the risk of them." In *Addie* v. *Dumbreck* (3) it was laid down by Lord Hailsham L.C. that "there are three categories "in which persons visiting premises belonging to another person "may fall; they may go (1.) By the invitation, express or "implied, of the occupier; (2.) With the leave and licence of the "occupier, and (3.) As trespassers." He went on to say that "it was suggested in argument that there was a fourth category of persons who were not on the premises with the leave "or licence of the occupier, but who were not pure trespassers. "I cannot find any foundation for this suggestion either in "English or Scotch law, and I do not think that the category "exists." Lord Dunedin in the same case (4) gave as a test of an invitee that "He must be on the land for some purpose in "which he and the proprietor have a joint interest." That joint interest must be similar to a business interest: a merely benevolent interest is not sufficient. Lord Buckmaster defined an "invitee" in *Fairman* v. *Perpetual Investment Building Society* (5) as "persons invited to the premises by the owner "or occupier for purposes of business or of material interest." In order to bring a case within the principle of *Indermaur* v.

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(1) (1866) L. R. 1 C. P. 274, 287.
(2) [1913] 1 K. B. 398, 411.
(3) [1929] A. C. 358, 364.
(4) [1929] A. C. 371.
(5) [1923] A. C. 74 80.

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Dames (1) it is essential that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows of the danger and runs the risk he has no cause of action: *Cavalier* v. *Pope* (2), per Lord Atkinson; *Brackley* v. *Midland Ry.* (3); *Hillen* v. *I.C.I.* (*Alkali*), *Ld.* (4) In the present case the children were not invitees; they entered the pool for their own purposes, and not for some purpose in which they had a common interest with the defendant council. The duty of an occupier to warn a licensee of a concealed danger is limited to a concealed danger actually known to the occupier and is not a duty to warn the licensee against a concealed danger which the occupier ought to have known: *Fairman* v. *Perpetual Investment Building Society* (5); *Sutcliffe* v. *Clients Investment Co.* (6) The dicta to the contrary effect by Lord Atkinson and Lord Wrenbury in *Fairman's* case (7) and by Lord Hailsham L.C. in *Robert Addie & Sons* (*Collieries*) v. *Dumbreck* (8) were made per incuriam. If those dicta were correct the duty towards a licensee would be exactly the same as the duty to an invitee: see Salmond on Torts, 9th ed., p. 523. But it is universally agreed that the duty towards an invitee is more extensive than that owed to a licensee. In *Glasgow Corporation* v. *Taylor* (9) a child of seven years of age lawfully entered a botanic garden maintained by the corporation, and was there poisoned by eating the berries of a poisonous shrub of tempting and innocent appearance. It was held that the corporation were liable for negligence in exposing young children to such temptation and danger without warning or other protection. That case is distinguishable from the present case because there the corporation knew the poisonous shrub was in the garden and that it was dangerous, whereas in the present case the borough council did not know of the existence of broken glass in the pond.

(1) L. R. 1 C. P. 274.
(2) [1906] A. C. 428, 432.
(3) (1916) 85 L. J. (K. B.) 1596.
(4) [1934] 1 K. B. 455, 466.
(5) [1923] A. C. 74.
(6) [1924] 2 K. B. 746.
(7) [1923] A. C. 86, 96, 97.
(8) [1929] A. C. 358, 365.
(9) [1922] 1 A. C. 44.

[GREER L.J. The case which is most against you is the Irish case of *Cooke* v. *Midland Great Western Ry. Co. of Ireland.* (1)]

The decision in that case rests upon the ground that there was evidence from which the jury were entitled to infer that the plaintiff was on the turntable with the leave and licence of the railway company, and that the turntable was in the nature of a trap. In the present case the duty of the defendant council was to warn the children who used the pond of a concealed danger, if it was known to them to exist. In *Gow* v. *Glasgow Education Authority* (2) a blind boy aged seven years, the inmate of a hostel provided by an education authority, while at play in a room with other children, some of whom were not blind, was injured through being knocked down by another boy who unexpectedly jumped upon his back. It was held, in an action brought by his father, that the education authority owed no duty to provide constant supervision, and that it was not proved that the accident would not have happened if a supervisor had been present. In the present case there was no causal connection between the accident and the failure of the council to provide another rake. In *Cahill* v. *West Ham Corporation* (3), where a boy was injured in running races at a play centre provided by the defendant corporation, it was held by Porter J. that the question of liability depended upon the degree of care that had been exercised, and he held on the evidence that the defendants were not liable. In the present case the necessary degree of care had been fulfilled by the daily raking of the pond, which was more than enough to prevent any damage being done by any possible glass in the pond. In *Purkis* v. *Walthamstow Borough Council* (4) the defendants were held by the Court of Appeal not liable for personal injuries to a boy who fell from a swing in a recreation ground provided by the defendants, as the boy's fall, according to the evidence, was due to the boy's sickness and fainting, and there was no evidence upon which the jury could find

(1) [1909] A. C. 229.
(2) 1922 S. C. 260.
(3) The Times Newspaper, June 25, 1937.
(4) (1934) 151 L. T. 30.

that the boy's injuries were due to lack of supervision on the part of the defendants. Scrutton L.J. said (1): The authority "would be liable for defective or dangerous premises or "implements for play. But, in my opinion, the authority which "has provided unobjectionable structures or implements for "play is under no duty to supervise their employment. . . . . "I am aware that many authorities do not attempt to supervise "the proper swings they provide, and I am not aware of any "authority or principle that requires them to do so." Greer L.J. said (2): "I think, on the admitted facts of the case, [the "boy] was a licensee, and the only duty on the defendants "was their duty to him as such licensee; that is to say, they "would be liable if there were a danger which was known to "them and was not known to the boy, and which the boy "could not be expected to avoid." Scrutton L.J. there held that a local authority had a power but not a duty to provide recreation grounds. That decision is an authority in favour of the present appellants.

R. F. Levy K.C. and *I. H. Jacob* (*R. Gold* with them) for the respondents. The plaintiff in this case was an invitee and not merely a licensee. He was not in the park merely by the invitation of the defendant council but as of right. The plaintiff's father was a ratepayer, and the pond was provided out of the rates and ratepayers contributed to the upkeep of the park and pond, and ratepayers had a right to be there. The by-laws which the defendant council made for the regulation of the park and pond make no distinction between ratepayers and persons who are not ratepayers. In *Hastie* v. *Magistrates of Edinburgh* (3) a child fell into an artificial lake in a park provided by the defenders and was drowned. It was alleged by the boy's father that the boy's death was due to the fault of the defenders, in that the pond was badly constructed and dangerous owing to its steep sides and the defenders did not provide an attendant. It was held that the pursuer's averments were irrelevant. There the lake was not constructed for the purpose of children going into it, but

(1) 151 L. T. 32.
(2) Ibid. 33.
(3) 1907 S. C. 1102.

as an ornamental piece of water to add to the beauty of the park. In *Purkis* v. *Walthamstow Borough Council* (1) the boy who was injured could not be an invitee because the invitation was only extended to children under twelve years of age and the boy was fourteen, and therefore that case is no authority in the present case, where there was an invitation held out to children to make use of the pool, because it was called in the notice a paddling pool and was put there for the use of children.

[GREER L.J. It has been laid down that in order that a person should be an invitee there must be a common material interest between that person and the occupier of the land.]

It is true that the local authority does not carry on any business, but it clearly has an interest in promoting the health of the children of the neighbourhood and in taking children off the streets. There is no distinction between the duty of a licensor to a child who is a licensee and the duty of an invitor to an invitee. The duty of a licensor to a licensee who is a child is higher than to an adult licensee. It is clear from *Cooke* v. *Midland Great Western Ry. Co. of Ireland* (2) that the defendants are liable, as they owed a duty to children to prevent this pond being in a dangerous state. To give warning of danger is not sufficient if the licensee is too young to profit by it: Salmond on Torts, 9th ed., p. 536. If the infant plaintiff was only a licensee it is clear that the defendant council are liable, as they knew of the danger and therefore they ought to have taken steps to protect children against the danger.

[They were stopped.]

Macaskie K.C. replied.

GREER L.J. On August 19, 1936, the infant plaintiff went to a park or recreation ground which is owned by the defendant corporation. He went there in the morning, at a time when the representative of the corporation who usually raked out the pond for the purpose of making it safe for children to paddle in had just finished such raking out as he did. Almost immediately after that the infant plaintiff stepped into the pond with a friend in the part of the pond adjoining where the sand was, and his foot came into contact with a piece of broken glass which was produced for the information of the Court—obviously something very dangerous to a child stepping upon it. He was almost immediately taken from where he had met with his accident and attended to by one of the persons in charge of the pond and later on at a hospital.

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(1) 151 L. T. 30, 33.

(2) [1909] A. C. 229.

He brought an action against the corporation for damages for negligence, and the learned judge upon the particular facts of this case held that the child was in the position of invitee, that he was invited by the corporation to use this pond for the purpose of paddling in it, that it was a matter of interest to the corporation that children, especially the children of ratepayers, should have the opportunity of getting away from the streets, and should have the more healthy occupation of paddling in a pool which had been constructed in such a way as to indicate that it was there for the purpose of children paddling in it. It was in the form of a saucer, not very deep, a place where children could not be drowned ; and not merely an ornamental piece of water, as in one of the Scottish cases. There was upon the premises a notice-board in this form : " Owing to the risk of cut feet, persons "must not take into the paddling pool any bottles, tins or "other sharp materials "—indicating to my mind that those who represented the corporation, and were responsible for the notice, treated this pool as a paddling pool for the children, and, in addition to that, they recognized that there would be a real danger to the children who paddled there if bottles, tins or other sharp materials were put there.

There is another fact which seems to me to indicate that it might well be thought that the relationship of the corporation and the infant plaintiff was a relationship of invitor and invitee, because for many years the corporation officials have known that the pool was constantly used for the very purpose which is mentioned in the notice—namely, for the purpose of the children paddling there, and, recognizing that fact, they have taken precautions, which the learned judge found to be inadequate, to see that there were no dangerous pieces of glass in any part of the pond where the children were likely to be paddling.

If this question were free from authority, I should be inclined to agree with the learned judge that the position was one as between invitor and invitee; but it is not necessary to decide that point. I am rather puzzled by the various decisions that have been given on the question as to when the relationship between two persons is to be regarded as that of invitor and invitee, or whether it ought to be held that in a case like this there is no evidence on which the judge would be entitled to hold that that relationship existed between the defendant corporation and the infant plaintiff. I am not deciding that point but am reserving it for future decision if it ever becomes necessary. Without deciding that the relationship between the defendant corporation and the infant plaintiff was that of invitor and invitee I will treat this case as a case of the defendants being licensors and the infant plaintiff being a licensee.

In *Addie* v. *Dumbreck* (1) in giving judgment Lord Hailsham L.C. directly laid down the proposition that in considering cases of this kind there are only three categories in which persons visiting premises belonging to another person may fall. Unfortunately, by what I think was a slip in giving judgment, he stated the rule as between licensor and licensee as being in effect the same as that between invitor and invitee. I do not think the other members of the House agreed with that part of the learned Lord Chancellor's speech. I therefore treat his speech as if the words " or ought to be known " were eliminated from it, because that would be in accordance with the authorities when we are dealing with a case of licensor and licensee.

There are many authorities dealing with the question; but, at the risk of being thought to be too fond of my own opinion, I cannot help thinking that the correct position is stated by me in *Purkis* v. *Walthamstow Borough Council.* (1) In that case all three Lords Justices agreed as to the ground of the decision, which was that, assuming there was some duty, the accident did not arise because of any breach of any duty by the representatives of the defendant council, but was a result of the plaintiff, the injured boy, having done something himself which he ought not to have done: there was no causal connection, we held, between the alleged negligence and the unfortunate result that happened to the plaintiff. And that is correctly stated in the headnote to be the ground of the decision in the case; but certain observations were made, which indeed were obiter, by Scrutton L.J. and myself, and they are mentioned in the headnote: " Per Scrutton L.J.: "The authority would be liable for defective or dangerous "premises or implements for play." In saying that I think he is assuming the relationship of licensor and licensee. " But in his opinion the authority which had provided "unobjectionable structures or implements for play was under "no duty to supervise their employment, still less to ascertain "that each child using them was physically fit to stand a "swinging or revolving motion." An accident could happen to a boy by falling off a swing through becoming sick and when he was on the ground being knocked by the swing continuing to revolve, and being hurt in consequence. The learned Lord Justice goes on: " He was aware that many "authorities did not attempt to supervise the proper swings "they provided and he was not aware of any authority or "principle that required them to do so."

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(1) [1929] A. C. 358, 364.

Then the headnote continues: " Per Greer L.J.: The "plaintiff was merely a licensee, and any liability of the council "could only arise if there was a danger known to them and "not known to the plaintiff which he could not be expected "to avoid. The evidence did not establish any breach of duty "on the part of the defendants towards the plaintiff." In my judgment I said that whatever might be the position of the children who were under age, that is to say, were of the age of those who were invited to use the playground, the plaintiff, at any rate, was not included in that category but was a mere licensee. Having dealt with that, I went on to say this (1): "On the other hand, I think, on the admitted facts of the "case, he was a licensee, and the only duty on the defendants "was their duty to him as such licensee; that is to say, they "would be liable if there were a danger which was known to "them and was not known to the boy, and which the boy "could not be expected to avoid." I think that correctly represents the law as it has been decided with regard to licensors and licensees.

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(1) 151 L. T. 30.

There have been several cases in Scotland which have raised similar points, one of them being the case of *Hastie* v. *Magistrates of Edinburgh* (2), which I think we are entitled to treat as having received the approval of the House of Lords when it was mentioned in a later case. In that case the boy fell into a lake which had not been constructed for the purpose of boys going into it at all, but had been constructed merely for the purpose of being a part of the amenities of the park in the sense of being something beautiful to look at. The boy fell into the water and was drowned. It was there held that the boy was a mere licensee and the corporation were under no liability to him; but that case does not seem to me to have any bearing upon the present case.

There is another Scottish case that went to the House of Lords, *Glasgow Corporation* v. *Taylor*. (3) In that case there was in a botanic garden maintained by the corporation a shrub which bore poisonous berries. The corporation had not taken any steps to remove the poisonous berries or to warn children who they knew were in the habit of frequenting the park that they ought not to consume any of these poisonous berries. It was held in those circumstances that the corporation were liable, even though the child who had eaten some of the poisonous berries and had died was merely a licensee.

In the present case, assuming, as I do assume for the purposes of this case without finally determining it, that the infant plaintiff was a mere licensee, what is the position of the defendants towards the licensee? The position, I think, is that to which I referred in *Purkis* v. *Walthamstow Borough Council* (1): if they knew of the danger to which the children would be exposed by using this paddling pool (a description which is taken from the notice that they put up at the side of the pool), their obligation was to see that the danger, which they recognized existed, should be provided against either by sufficiently removing all risk to which the children were likely to be subjected when they paddled in the pool or by seeing that the children did not paddle in the pool at all.

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(1) 151 L. T. 33.
(2) 1907 S. C. 1102.
(3) [1922] 1 A. C. 44.

All that they did was that they provided a rake which adequately raked the deeper part of the pool—it was not really deep anywhere, but the greater part of the pool—but which had little or no effect upon that part of the pool into which the plaintiff stepped; because it was a rake that would not do more than remove anything from the surface of the sand but would not remove anything embedded in the sand.

On the occasion on which the plaintiff was in fact injured there was undoubtedly a dangerous piece of glass in the sand adjoining the patch of sand at the side of the pool on which the children played; and it was removable, because, when the plaintiff's elder brother came with him in the afternoon, he removed it with a piece of stick. It is impossible to suppose that it was not a removable piece of glass, or that the defendants had taken sufficient measures to do away with the risk to which children were exposed if they used this paddling pool for the purpose for which it was intended—namely, to paddle in. In the afternoon it was removed, as I said, by the plaintiff's brother with the aid of a very imperfect implement, a piece of stick. I have very little doubt that the corporation officials could have procured an instrument which would in fact have adequately dealt not only with the centre of the pool but with that portion of the pool where the sand was if they had directed their attention to the question at all. That they recognized that it was a danger is obvious from the

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(1) 151 L. T. 30.

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fact that they took precautions day after day to remove from the pool articles which might endanger the safety of the children; but they in fact left there a danger which they could have removed if they had taken adequate measures to remove it. Accordingly I think they are liable to a licensee who was with their permission using the pool for the purposes for which it was intended.

Unfortunately the infant plaintiff had, almost immediately after the raking had been done, stepped on to a piece of sand that adjoined the place where the sand was provided for children who desired to enjoy themselves in making sand castles or otherwise, and he stepped on this piece of glass, which was a removable danger but which the corporation had taken no reasonable care to have removed. It does not seem to me to matter that the corporation officials did not know that the actual piece of glass was there; the question is, whether they knew that there was a danger to children that they ought to provide against? Having made a wholly inadequate provision for the removal of the dangerous object at the place where the plaintiff stepped, it seems to me they are liable to the plaintiff upon that ground, and it seems to me quite unnecessary to enter into the other grounds which were put forward by the learned judge as reasons in support of his judgment. The respondents are entitled to rely upon any ground which is sufficient to support the decision, and the ground which I think is sufficient is that the corporation recognized the danger to the children when they stepped into this pond at the place adjoining the sand patch, but that they took inadequate measures to remove that danger, and exposed the children to a danger which they could have prevented if they had taken adequate measures to prevent it.

For these reasons I think the learned judge's judgment can be supported. I do not think it necessary to refer in detail to the various cases which have been mentioned in the course of the case; they are all collected in that valuable work, Sir John Salmond's book on the Law of Torts, and I think they support, or do nothing to prevent, the inference

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which I have decided is the proper inference from the facts proved in this case.

There is, however, one case to which I do wish to refer; that is the Irish case, *Cooke* v. *Midland Great Western Ry. Co. of Ireland.* (1) In that case the facts were that a child received an injury from playing on a piece of ground where there was a danger through the risk of a turntable being started while children were playing. The children were certainly not invitees; they were not even licensees; they were treated as trespassers. But, inasmuch as the company by its servants knew that it was a regular habit of these children to come on to this ground and play upon it, and they did nothing to stop them and to prevent the danger which in fact arose, the Irish Court decided that the railway company were liable for the accident which happened, and their decision was upheld by the House of Lords. Lord Atkinson treated the case as one of licensor and licensee, but I am not sure that the other members of the House did so treat the case. Lord Atkinson said (2): " For the omission to make the turntable "fast the defendants are responsible. If the plaintiff entered "upon these premises and played on this turntable with the "leave and licence of the defendants, then these latter owed "to the child a duty not to permit the machine to be in the "movable and dangerous, because movable, condition in which "they permitted it in fact to be. Young Monahan and his "playmate no doubt intervened and made the turntable "revolve"—they were not the plaintiffs—" but the omission "of the defendant company to discharge the duty which, on "the above-mentioned assumption, I think they owed to the "plaintiff, namely, to cause the machine to be made immovable "by boys and children, and therefore a safe thing for them to "play with, was not only the causa sine qua non but also the "causa causans of the accident. It was, of course, for the "jury to determine whether leave and licence had in fact been "given. There was, I think, as I have already stated, evidence "proper for their consideration on that question."

The jury seem to have found that the boy was there with

(1) [1909] A. C. 229. (2) Ibid. 240.

the leave and licence of the railway company, and Lord Atkinson obviously took the view that there was evidence upon which the jury could so decide. I think there was evidence here on which the learned judge could decide that this unfortunate plaintiff was in the pond with the leave and licence of the defendant corporation or of those whom they put there to look after the pond.

I think that is all I need say about this case. I have already indicated that I am not giving any binding decision upon the question whether the learned judge was right in finding that this was a case of invitor and invitee; I am treating it as a case of licensor and licensee; but still there is a liability on the licensors to protect licensees from dangers which are known to the corporation, the licensors, and which are not likely to be known to the licensee, that is to say, to a child who is not likely either to have read notices or performed the mental operation of considering whether or not there are likely to be dangers in the pond.

For these reasons, though I do not agree with everything that the learned judge said in the course of his judgment, I have come to the conclusion that liability was established and that therefore this appeal must be dismissed with costs.

SLESSER L.J. Although I have come to the opinion that this appeal fails, I think it right to say that I have come to that conclusion for reasons different from those which I understand were relied upon by the learned judge.

The learned judge in this case, having stated that the borough council had argued that this child was a mere licensee, and that therefore the duty which devolves upon those who invite did not devolve on them, goes on to say that he does not think there is anything in the authorities which impels him to limit this child to the class of bare licensee. He says in his judgment: "In my view, taking the "description of an invitee which is used by Lord Dunedin in "*Addie* v. *Dumbreck* (1), I am quite certain that this little "child was an invitee."

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(1) [1929] A. C. 358, 371.

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Now, when I look at the observations of Lord Dunedin in *Addie* v. *Dumbreck* (1), referred to by the learned judge, I find this statement: "The best test of who is an invitee "is, I think, given by Lord Kinnear in *Devlin's* case. (2) He "must be on the land for some purpose in which he and the "proprietor have a joint interest."

With every respect to the learned judge, I find it difficult in this case, either for the reasons which he has stated, which I will mention, or for any other reason, to see what interest the borough council had in this child being on this land, that is, an interest cognizable in law so as to make them invitors. If one thing is certain in this difficult question more than another it is that an invitor is not everybody who invites somebody on to his land. As was pointed out by Hamilton L.J., as he then was, in *Latham* v. *R. Johnson & Nephew, Ld.* (3) —a case which has since received on more than one occasion the authority and approval of the House of Lords—"Those "who are invited as guests, whether from benevolence or for "social reasons, are not in law invitees but licensees. The law "does not take account of the worldly advantage which the "host may remotely have in view"; and: "The latter term" —that is "invitee"—"is reserved for those who are invited "into the premises by the owner or occupier for some purpose "of business or of material interest."

I dismiss first the consideration which is urged by the learned judge that there was an interest on the part of the council in providing this pool because they had promised the inhabitants of the district to provide a pool out of the rates. The learned judge goes on: "There is no doubt that "that is one of the promises undertaken to the ratepayers. "At any rate, it would be very curious if it is not." I will content myself with saying that there is no evidence whatever that the ratepayers at any time were promised by the council the provision of a paddling pool; and, even if there were, I do not think it would constitute in itself any such material interest: first, because this paddling pool has been

(1) [1929] A. C. 358, 371.
(2) [1902] 5 F. 130, 135.
(3) [1913] 1 K. B. 398, 410.

there for a considerable time, and it may or may not be the case that the present councillors feel themselves bound by a promise which was made by their predecessors, if it ever was made, of which there is no evidence; and, secondly, because in any event there is not a material but, I suppose, only a spiritual interest in keeping promises.

So that I think one may dismiss that question altogether from one's consideration, and, indeed, it would be an extraordinary circumstance if, as MacKinnon L.J. pointed out to counsel during the argument, a person who was a ratepayer in such circumstances—or even more so, I suppose, if a ratepayer's infant son who was injured—could say: Because I am a ratepayer, or, my father is a ratepayer, I am an invitee—while somebody else who was not in that fortunate or unfortunate position would only be a licensee. It might give rise to many difficulties which scarcely bear consideration, such as this, that there is no evidence that this paddling pool is provided out of the rates at all; it may have been a gift from some benevolent person; it may have been in part supported out of the funds of the Exchequer; and it may well be, for aught I know, that this paddling pool is open to all on equal terms whether they are ratepayers or not; at any rate, there is no evidence to the contrary.

The only evidence on the matter is contained in the by-laws, which were before the learned judge, of the Bishop's Park of the Metropolitan Borough of Fulham, which have the authority of the Secretary of State under the Act and are therefore binding, which make no distinction at all between ratepayers or the children of ratepayers and other persons. There are many things which you are prohibited from doing in this park. Indeed, I should think it would be difficult to remain in this park for any length of time without committing some offence against one of the by-laws. Certainly the least raising of the voice in secular or sacred song appears to be a crime. Whatever the prohibitions are, they are applied equally to ratepayers and to persons who are not ratepayers.

The second ground mentioned by the learned judge is that this pool is provided for the purpose of children paddling in the way in which this child did. Now I find it difficult to understand why in principle there is any difference between a paddling pool provided for children to paddle in and any public park provided for the recreation of citizens. In this connection there is an important observation made in the case of *Glasgow Corporation* v. *Taylor* (1), to which my Lord referred. That was the case where, there being a public park provided and maintained by the Corporation of Glasgow, on certain ground in the park they permitted to grow a shrub bearing poisonous berries which presented a tempting appearance to children. This piece of ground was open to the public and was in a part of the grounds much frequented by children ; and, on the question of the liability of the corporation arising owing to a child unfortunately having eaten one of these berries, Lord Shaw points out (2) : " In grounds open to the "public as of right, the duty resting upon the proprietors, or "statutory guardians like a municipality, of making them "reasonably safe does not include an obligation of protection "against dangers which are themselves obvious. Dangers, "however, which are not seen and obvious should be made the "subject either of effectively restricted access or of such express "and actual warning of prohibition as reaches the mind of "the persons prohibited. The two Scotch cases of *Hastie* (3) "and *Stevenson* (4) clearly illustrate the distinction."

I read that to mean that in grounds open to the public as of right the public are there not as invitees, in which case the greater obligation laid down in the case of *Indermaur* v. *Dames* (5), the responsibility for unusual dangers which were known or ought to have been known, would apply to the invitor, but the more limited liability of licensor.

Lord Atkinson (6) appears to me to speak to the same effect, because, having said that the unfortunate child was not merely there as a licensee but as of right, he goes on to say : " The defenders were, therefore, aware of the existence "of a concealed or disguised danger to which the child might

(1) [1922] 1 A. C. 44.
(2) Ibid. 60.
(3) 1907 S. C. 1102.
(4) 1908 S. C. 1034.
(5) L. R. 1 C. P. 274.
(6) [1922] 1 A. C. 53.

"be exposed when he frequented their park, a danger of which "he was entirely ignorant, and could not by himself reasonably "discover, yet they did nothing to protect him from that "danger or even inform him of its existence."

Now, that observation makes it clear to my mind that Lord Atkinson similarly was treating the child in that park as being in the position of a licensee; and for myself I think the distinction which Maugham L.J., as he then was, appears to have drawn in the case of *Purkis* v. *Walthamstow Borough Council* (1)—making a kind of intermediate state between the invitee on the one hand and the licensee on the other when a person is invited into a public park where he has a right to be—is one which cannot be supported, more particularly in view of the observations in the House of Lords to the effect that there is no intermediate state between that of an invitee and that of a licensee.

For all these reasons I think the learned judge was wrong when he founded his judgment, as I think he primarily did, on the finding that this child was an invitee. I think, agreeing with my Lord, that this child was a licensee. In those circumstances one has to apply the test to which my Lord has referred. Applying that test, it seems to me clear on the evidence in this case that the corporation did those things or failed to do those things which constitute them responsible as licensors for the injury which the child has suffered.

In the first place, I think it is clear that the injury which this child incurred of cutting his foot on glass was due to a danger which was obvious to the corporation. They had, as my Lord has said, put up a notice for the very purpose of preventing this kind of danger arising; and, moreover, there is specific evidence that one of their agents, a park-keeper, had been informed not more than ten days or a fortnight before the infant plaintiff was injured that another child had suffered a cut while paddling in this very pond—a complaint which was brought to the notice of the park-keeper to this extent, that, though perhaps the wound was

(1) 151 L. T. 30.

not serious, he thought it sufficiently serious to bandage that child's limb and to put iodine upon it.

Therefore there is clear evidence to my mind that this corporation knew and anticipated this danger of glass, and indeed, as my Lord has pointed out, sought to guard against it. Now, the method by which they sought to guard against it was to employ a rake adapted for what they conceived to be the purpose they had in view. On that the evidence is uncontradicted, and indeed it is the evidence of their own witness responsible primarily for the cleansing of this pond, Mr. William Bowes: that whenever the sand is heavy the rake would be quite useless. That was the question which was put to him. He answered: " It would take the top off it. "(Q.) Is it not obvious to you that bits of glass or tin, if they "are thrown into the edge, will go into the sand? (A.) Yes. "(Q.) Then, you see, your rake will not get them out and you "cannot see them. That is right, is it not, if they are in the "sand. The point has been made against me lots of times "that if it is in the sand it cannot be seen. (A.) Yes. The "sand is not that thick all over, you know."

So that, on the admission of Mr. Bowes himself, this rake, when it came in contact with the sand, was only competent to take off at most the top of the sand for some inches, and so far as raking was concerned, any glass that got into that place would certainly remain there whether there were raking or not.

Now in this particular case the evidence is this, that the raking had taken place immediately before this child stepped into the pond on to the sand and was injured, that immediately afterwards the man who had been raking came back from his hut, and there was, so far as one can see, no time or opportunity for glass to have fallen in during that time after his last raking. The result is that this raking which is relied upon by the corporation as an adequate means of guarding against a known danger is proved on the admission of their own evidence to have been entirely ineffective. Therefore the case stands thus, that as regards the territory in which this child was injured, the sand on the verge of this lake, there was really no physical precaution taken at all.

The only other precaution which is relied upon is that there were several park-keepers employed. As to them the evidence of the children is that for the most part they were never to be seen, and the actual evidence as to this occasion is that one or two of them were engaged, no doubt very properly, in apprehending some man who was improperly conducting himself in another part of the park ; and it is quite obvious from the evidence that no effectual means were taken, beyond the notice, to prevent any person so disposed, adult or child, from throwing bottles or other breakable material into the pond when they liked. It is not disputed that this pond was left for long periods without the supervision of any man.

It follows, therefore, upon those two facts being found—first, that this danger was known by the authority, and, secondly, that they took no reasonable, or indeed, any, precaution to prevent this glass falling on to this area where the child was injured—that they are responsible as licensors ; and therefore, for that reason, as I say, this appeal fails.

MacKinnon L.J. I agree that this appeal fails. I only desire to add a very few words about the law.

As the result of a great number of cases, there is now no doubt whatever that those who suffer physical injuries upon the premises of other people have to be divided into three categories, as is laid down by Lord Hailsham in *Addie* v. *Dumbreck*. (1) Personally I think the names or nicknames that have been customarily applied to describe those three categories are a little unfortunate. We all know what trespassers are, and that category is clear ; but the names of the other two categories, " invitees " and " licensees," are, I think, unfortunate for the reason that the most obvious use of the word " invitation " in common language is that of a request by a host to another person to attend a social function. A person who accepts that request and goes to his host's house

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(1) [1929] A. C. 358, 364.

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none the less ought to go into the category of licensees and not into that of invitees.

The question has been raised in this case whether this child ought to be regarded as an invitee or a licensee. The difference between the two may be in some cases difficult of definition. The best definition, as it seems to me, to be derived from the cases is that very neatly stated in Salmond on Torts, 9th ed., p. 514, where he says that an invitee "is a person "who receives permission from the occupier as a matter of "business and not as a matter of grace. An invitation is a "request to enter for the purposes of the occupier; a licence is "a permission to enter for the purposes of the entrant himself. "The invitor says 'I ask you to enter upon my business.' The "licensor says 'I permit you to enter on your own business.'"

Inasmuch as the provision of public parks of this nature is very common all over the country, I think it is desirable that we should not leave in doubt the question, to be raised in another case, whether one who enters such a park by the invitation or permission of the public authority providing the park is to be classed as an invitee or a licensee. Upon all the cases it seems to me quite clear that such a person is only a licensee, and that the child in this case was only a licensee. In that respect I differ from the grounds on which the learned judge decided this case, though, for the reasons which have been stated by my brothers, I agree that the appeal fails.

Appeal dismissed.

Solicitor for appellants: *W. Townend, Town Clerk, Fulham.*
Solicitors for respondents: *Tobin & Co.*

R. F. S.

COLLYER (H.M. INSPECTOR OF TAXES) *v.* HOARE AND COMPANY, LIMITED (No. 2).

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June 18, 21, 22, 28.

Revenue—Income Tax—Profits from trade—Deductions—Deficiency of rent—Leasehold premises let by brewers to tied tenants—Premium paid by brewers on grant of lease—Sum paid by brewers on purchase of existing lease—Sum expended by brewers on alterations and improvements under covenant—Amount of debt foregone on assignment of lease to brewers in satisfaction of debt—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

A brewery company had, during the years under assessment, from time to time purchased or acquired leases of licensed houses which it let on yearly tenancies, or for periods of years, to tenants who were tied to the company for all the beer, wine and spirits sold on the premises so let. The company had about a thousand such houses. It was not disputed that in computing the profits of its trade for assessment under Sch. D, Case I., the company was entitled to a deduction of the difference between the rents paid by it for its leasehold houses, or the Sch. A assessments on its freeholds, and the rents (including the annual equivalent of any premium from the tenant) received by it from the tied tenants. It was now claimed by the company that, in computing the deficiency of rent in respect of any leasehold licensed house, the following sums, paid or foregone by the company on its acquisition of the house, should be spread over the period of the lease, and the annual equivalent of each such sum added to the amount which the company paid in the name of rent: (1.) a premium paid by the company on the grant to it of a lease at a yearly rent; (2.) a sum paid on the purchase by the company of an existing lease; (3.) a sum expended by the company on alterations and improvements in a licensed house under a covenant so to do; and (4.) the amount of a debt foregone on the assignment to the company of a lease of premises in satisfaction of a debt due to the company:—

Held, that in computing the deficiency of rent the comparison to be taken was between what the premises would fetch at a rack rent or the annual value, as assessed for the purposes of income tax under Sch. A, whichever is greater, on one side, and the aggregate of the rent paid by the tenant, plus the annual equivalent of any premium paid by the tenant for his lease, on the other; that, if alterations and repairs made by the brewers added to the value of the premises, such expenditure would be reflected in the rack rent, or in the annual value of the premises; and that none of the deductions claimed could be allowed.

APPEAL by way of case stated by the Special Commissioners of Income Tax under s. 149 of the Income Tax Act, 1918.

The case stated was as follows:—

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts, held on May 15 and 16 and July 5, 1935, Hoare & Co., Ld. (hereinafter called "the "company"), appealed against assessments made upon it under Case I. of Sch. D of the Income Tax Act, 1918, in respect of the profits of its trade for the years 1924–25 to 1933–34 inclusive.

2. The company during the years in question carried on the business of brewers at The Red Lion Brewery, St. Katherine's Way, E. Following a common practice among brewers the company had, in order to increase its trade, from time to time purchased or acquired leases of licensed houses, which it let on yearly tenancies or for periods varying from seven to twenty-one years and upwards to tenants who were tied to the company for all the beer, wine and spirits sold in the premises let. The company had about a thousand houses which were so let. The company had also a few licensed houses which were let without a tie.

3. Under the decision in the case of *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) the company was entitled in computing the profits of its trade for assessment under Case I. of Sch. D to a deduction of the difference between the rents paid by it for its leasehold houses or the Sch. A assessments on its freeholds and the rents received by it from the tied tenants, this difference being hereinafter referred to as "the deficiency of rent."

Under the later decision in the case of *Hoare & Co., Ld.* v. *Collyer* (2), it was held that, in computing the deficiency of rent in respect of any tied house, account must be taken of any premium paid by the tenant for his lease as well as of the rent. It was agreed that the premium should be spread over the term of the lease, and the aggregate of the tenant's rent and the part of the annual equivalent of the premium apportioned to each year be set against the rent paid by the brewer, or the Sch. A assessment of the house, in order to ascertain the deficiency of rent (if any) on that house.

(1) [1915] A. C. 433; 6 Tax Cas. 399.
(2) [1932] A. C. 407; 17 Tax Cas. 169.

4. It is admitted on behalf of the appellant that (apart from the question in issue in the present case) the sum to be taken for comparison with the rent received by the company from a tied tenant for the purpose of computing the deficiency of rent of the house is the rent paid by the company or the gross annual value of the house as assessed for the purpose of income tax under Sch. A, whichever is the greater sum.

5. It is now claimed by the company that, in computing the deficiency of rent in respect of any leasehold licensed house acquired by the company, any sum (falling within any of the four categories hereinafter mentioned) paid or foregone by the company on its acquisition of the house should be similarly spread over the period of the lease, and the annual equivalent of the sum in question (herein called the " extra sum ") added to the sum which the company paid in the name of rent. It was agreed that if the extra sum was to be taken into account at all its annual equivalent should be determined on the basis of the 5 per cent. Annuity Tables. There was a great number of houses held by the company on which the point arose.

6. The sums which it is sought to treat in this way fall into one or other of four categories :—

(i.) A premium paid by the company on the grant of a lease at a yearly rent to the company, which has let the premises to a tied tenant at a yearly rent, with or without a premium. We have not thought it necessary to distinguish between cases where the company has let the premises at a premium and where it has not, because the annual equivalent of the premium received (where a premium has been charged) is added to the rent in accordance with the decision referred to in para. 3 hereof. The example given in para. 7 (*a*) hereof is an example of this class of case.

(ii.) A sum paid on the purchase by the company of an existing lease of premises which the company has let to a tied tenant at a yearly rent, with or without premium. The example in para. 7 (*b*) is an example of this class of case.

(iii.) A sum expended by the company on alterations and improvements in a licensed house under a covenant so to

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do, contained in a lease of the premises to the company, where the premises have been let by the company to a tied tenant at a yearly rent, with or without a premium. The example given in para. 7 (*c*) hereof is an example of this class of case.

(iv.) The amount of debt foregone on the assignment to the company of a lease of premises in satisfaction of a debt due to the company, which has let the premises to a tied tenant at a yearly rent, with or without premium. This arises where a lease has been granted by a third party to a person who has become indebted to the company, and has been assigned by that person to the company in satisfaction of his debt. In such a case the cost to the company of acquiring the lease is represented by its value at the time of its assignment. If the amount of the debt foregone exceeds such value the excess becomes the subject of a claim for allowance as a bad debt. The example in para. 7 (*d*) hereof is an example of the nature of this claim, though the actual circumstances were somewhat special.

7. The following are the typical examples above mentioned :—

(*a*) THE RED LION, EBURY STREET.

By an indenture dated July 16, 1923, the company was granted a lease of these premises for a term of nineteen years from Lady Day, 1923, at a premium of 1850*l.* and a yearly rent of 150*l.* The annual equivalent of the premium on the 5 per cent. tables is 1850*l.* ÷ 12·08 or 153*l.* The premises were let by the company on a tenancy at a yearly rent, without premium. The rent in the particular year selected was 252*l.* 14*s.* 10*d.*

The company's claim in respect of these premises is as follows :—

Annual equivalent of premium paid by the company	£153	0	0
Yearly rent paid by the company	£150	0	0
	£303	0	0
Less rent received from tied tenant	£252	14	10
Company's claim	£50	5	2

The appellant contends that the company has no claim for the reason that it is not permissible to take into account the annual equivalent of the premium paid by the company.

(*b*) THE BLACKSMITHS ARMS, UPPER CATERHAM.

On April 29, 1919, the company purchased the undertaking and assets of A. C. S. & H. Crowley, brewers, of Croydon, the total purchase consideration for the brewery and licensed properties being 190,330*l.* One of the properties so acquired was this house, which was then held for the residue of a term of ninety-nine years from March 25, 1877, at the yearly rent of 50*l.* Of the total purchase consideration the sum of 2500*l.* was apportioned by the company in its books as the price of this house, and this figure is accepted by the appellant.

The annual equivalent of the apportioned purchase price on the tables (2500*l.* ÷ 18·76) is 133*l.*

The premises were let to a tied tenant of the company at a yearly rent of 60*l.*

The company's claim in respect of these premises is as follows :—

Annual equivalent of purchase price paid by the company	£133	0	0
Yearly rent paid by the company	£50	0	0
	£183	0	0
Yearly rent received from tied tenant ...	£60	0	0
Company's claim...	£123	0	0

The appellant contends that the company has no claim, for the reason that it is not permissible to take into account the annual equivalent of the purchase price paid by the company.

(*c*) MERCER'S ARMS AND STABLES, STEPNEY.

Under and by virtue of an agreement for a lease dated July 30, 1931, and a lease dated March 29, 1932, these premises were demised to the company for a term of thirty years from Midsummer, 1931, for a consideration which included an agreement by the company to expend 1200*l.* at least on alterations and improvements of the premises, and the payment of a premium of 1650*l.* and a rent of 80*l.* Actually a sum of 1250*l.* was spent on alterations and improvements. The rents received from the tenant were 75*l.* for the Mercer's Arms and 130*l.* for stables forming part of the property, which were separately let.

The annual equivalent of the premium of 1650*l.* is 107*l.*

The annual equivalent of the outlay of 1250*l.* is 81*l.*

The company's claim in respect of these premises is as follows :—

Annual equivalent of the premium paid by the company	£107	0	0
Rent paid by the company	£80	0	0
	£187	0	0
Less rent of stables	£130	0	0
	£57	0	0
Annual equivalent of outlay	£81	0	0
	£138	0	0
Less rent received from tied tenant of Mercer's Arms	£75	0	0
Company's claim	£63	0	0

No question arises as to the sufficiency of the deduction made in this statement on account of the stables.

The appellant contends that the company has no claim for the reason that it is not permissible to take into account the annual equivalent of the sum expended on alterations and improvements.

(*d*) THE ETON HOTEL, HAVERSTOCK HILL.

By an indenture of lease dated August 18, 1873, these premises were demised for a term of seventy-two-and-a-quarter years (less ten days) from Midsummer, 1873, to W. L. Grosutt for a consideration which included a yearly rent of 100*l.* On April 14, 1897, the said premises became vested in James

Griffiths for all the residue of the said term, and by an indenture of mortgage of the same date the said James Griffiths mortgaged the said premises to the company to secure the sums therein mentioned.

By an indenture dated September 28, 1903, the company as mortgagees, in exercise of their statutory power of sale and in consideration of 7700*l.* paid to them by T. H. Russell, assigned the said premises to him for all the residue of the said term. By an indenture of even date the said T. H. Russell mortgaged the said premises to the company to secure a sum of 7400*l.*, then lent to him by the company. Subsequently the said T. H. Russell repaid to the company, on account of the said loan, the sum of 4600*l.*, leaving a sum of 2800*l.* unpaid, and by an indenture dated December 22, 1905, in consideration of the company releasing him from his liability to repay the 2800*l.*, the said T. H. Russell released to the company his equity of redemption in the said premises.

The annual equivalent of the said sum of 2800*l.* at the date of such release (2800*l.* ÷ 17·16) was 163*l.*

After such release the premises were let by the company, without premium, to a tied tenant at a yearly rent of 150*l.*

The company's claim in respect of these premises is as follows :—

Annual equivalent of the balance of the loan...	£163	0	0
Yearly rent paid by the company	£100	0	0
	£263	0	0
Less rent received from tied tenant	£150	0	0
Respondent's claim	£113	0	0

The appellant contends that the company has no claim, for the reason that it is not permissible to take into account the annual equivalent of the debt foregone.

8. It was contended on behalf of the company that in order to ascertain the deficiency of rent of a house it was necessary to take into account the premiums and the extra sums of the

character before mentioned paid, and the debts foregone by the company, in respect of the house.

9. It was contended on behalf of the inspector of taxes that the premiums, and sums claimed by the company to be in the nature of premiums, as indicated in the four categories set forth in para. 6 of this case, were capital outlays which could not properly be taken into account for the purpose of ascertaining the deficiency of rent.

10. The following cases were referred to: *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1); *Hoare & Co., Ld.* v. *Collyer* (2); *Commissioners of Inland Revenue* v. *The Scottish Central Electric Power Co.* (3); *Russell* v. *Aberdeen Town and County Bank* (4); *Gillatt & Watts* v. *Colquhoun* (5); *MacTaggart* v. *Strump*. (6)

11. Having considered the evidence and arguments we gave the following decision:—

"A number of distinct points are raised on these appeals.

"(1.) The treatment for the purpose of arriving at the "deficiency of rents of premiums paid by the company on "the grant to it of leases of licensed houses. Prima facie "these premiums are capital payments, and should not be "taken into account in computing the profits of a brewer, "any more than they can be taken into account in arriving "at the profits of other traders, and the case of *MacTaggart* v. "*Strump* (6) supports this view. Rowlatt J., however, in "his judgment in the case of *Hoare & Co., Ld.* v. *Collyer* (2), "said that if regard was to be had to premiums received, "regard must also be had to premiums paid, and we feel "bound to follow the view so definitely expressed by him. "We accordingly hold that the premiums paid should be "taken into account in arriving at the deficiency of rents.

"(2.) The treatment of the sums paid on the purchase by "the company of an existing lease. Though the capital "nature of such a payment is even clearer than in the case of

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(1) [1915] A. C. 433; 6 Tax Cas. 399.
(2) [1932] A. C. 407; 17 Tax Cas. 169.
(3) (1927) 13 Tax Cas. 331, 333.
(4) (1888) 13 App. Cas. 418; 2 Tax Cas. 321.
(5) (1884) 2 Tax Cas. 76.
(6) (1925) 10 Tax Cas. 17.

"a premium paid on the grant of a lease, we do not think "that in substance the case of such a payment can be "distinguished from that of a premium, and that it should "accordingly be treated in the same way as a premium, "whether the payment is made for the acquisition of an "underlease or for the subsequent acquisition of a head-"lease.

"(3.) The treatment of sums expended under a covenant "in the lease requiring the company to make alterations or "improvements to the licensed house. We hold that these "sums must also be taken into account in arriving at the "deficiency of rent, except in so far as they may have been "allowed as a deduction, as being expenditure for repairs, "in computing the company's profits. On the other hand, "any sums expended on alterations or improvements by the "company's tenant under a covenant in his lease must be "taken into account in computing the rent received by the "company.

"(4.) The surrender to the company of a lease of premises "in satisfaction of a debt. If the value of the lease at the "time of its surrender was less than the debt, the company "will, or should, have obtained at that time an allowance as "a bad debt of the excess of the debt over the value of the "lease. The cost to the company of acquiring the lease "would accordingly be its value at the time of its surrender, "and this cost should be treated in the same way as the sum "paid on the purchase of a lease in (2.) above."

The assessments were subsequently determined in accordance with this decision.

13. The question for the determination of the Court is whether any, and if so which, of the sums paid, or debts foregone, by the company on the acquisition of the lease of a licensed house are to be taken into account in ascertaining the deficiency of rent to be allowed as a deduction in computing the company's profits.

The Crown now appealed.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown.

The only relevant factor is the letting value of the house as compared with the tied rent. The fact that the brewer has paid a premium, possibly years ago, on acquiring the property is not relevant. The premium has already been taken into consideration in ascertaining the annual value. The only loss of rent the brewer can claim is a loss of rent because of the tie, and for no other purpose.

If loss is suffered for any other purpose, it is a landlord's outgoing, not a trader's outgoing. This was the reasoning underlying *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1)

The proper deduction is based on annual value, and rent is only allowed as an alternative because it is the best evidence of what the Sch. A value is.

Latter K.C. and *Cyril King K.C.* for the respondents. In *Hoare & Co., Ld.* v. *Collyer* (2) it was conceded that premiums must come in somehow in arriving at the annual value. What has to be found is the real loss that the brewer has sustained in order to get the tie, and that cannot be found unless the premium or other expenditure on leaseholds is decapitalized. If premiums are taken into account on one side they must be taken into account on the other. Otherwise the comparison is between two unlike things. See the dictum of Rowlatt J. in *Collyer* v. *Hoare & Co., Ld.* (3)

Cur. adv. vult.

1937. June 28. FINLAY J. This case raises questions which I at least have found questions of much difficulty. I cannot help thinking (and in this, I think, I follow what that great authority Rowlatt J. used sometimes to say) that from decisions of the House of Lords (decisions which are, of course, correct) there may have followed difficulties which were not altogether foreseen or anticipated by those who gave the decisions. One has, of course, to endeavour to apply the law as one understands it, and its application is certainly, in this particular case, by no means very easy.

(1) [1915] A. C. 433; 6 Tax Cas. 399.
(2) [1932] A. C. 407; 17 Tax Cas. 169.
(3) 17 Tax Cas. 169, 179–180.

The facts lie in a comparatively small compass. The appeal was by a well known brewing company, Hoare and Company, and they appealed against assessments for a number of years. Para. 2 of the case sets out the familiar position with regard to tied houses. The company carried on its business of brewing at The Red Lion Brewery, and, in order to increase its trade, had from time to time purchased or acquired leases of licensed houses, which it let on yearly tenancies, or for periods varying from seven to twenty-one years and upwards, to tenants who were tied to the company for all the beer, wine and spirits sold in the premises let. The company had about 1000 of these houses.

Para. 3 of the case describes the decision in a very well known case, *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1), and it says, and rightly says, that under that decision " the company was entitled in computing the profits of its trade for "assessment under Case I. of Sch. D to a deduction of the "difference between the rents paid by it for its leasehold houses "or the Sch. A assessments on its freeholds, and the rents "received by it from the tied tenants, this difference being "hereinafter referred to as ' the deficiency of rent.' "

Then there is set out the result of a later case, *Hoare & Co., Ld.* v. *Collyer* (2) (that is, the same company as are concerned here). The result of that case is set out, of course quite correctly, as follows : " it was held that, in computing the "deficiency of rent in respect of any tied house, account must "be taken of any premium paid by the tenant for his lease as "well as of the rent. It was agreed that the premium should "be spread over the term of the lease, and the aggregate of the "tenant's rent and the part of the annual equivalent of the "premium apportioned to each year be set against the rent "paid by the brewer, or the Sch. A assessment of the house, in "order to ascertain the deficiency of rent (if any) on that house."

Para. 4 is : " It is admitted on behalf of the appellant " (that is the inspector of taxes) " that (apart from the question "in issue in the present case) the sum to be taken for comparison

(1) [1915] A. C. 433 ; 6 Tax Cas. 399.
(2) [1932] A. C. 407 ; 17 Tax Cas. 169.

"with the rent received by the company from a tied tenant "for the purpose of computing the deficiency of rent of the "house is the rent paid by the company or the gross annual "value of the house as assessed for the purpose of income tax "under Sch. A, whichever is the greater sum."

Para. 5 sets out the claim of the company, and that claim is this: It is a claim relating to the computation of deficiency of rent. What they claim is this, that any sum falling within any of four categories set out in para. 6, paid or foregone by the company on its acquisition of the house, should be similarly spread over the period of the lease and the annual equivalent of the sum in question added to the sum which the company paid in the name of rent. It was agreed that if the extra sum was to be taken into account at all its annual equivalent should be determined on the basis of the 5 per cent. Annuity Tables.

Para. 6 sets out the four matters which arise and para. 7 gives examples. It is not necessary that I should go in great detail through them. The first and the main one (as I think, the only one, perhaps, which needs very careful consideration, in this sense, that the others seem really to follow) is this: "A premium paid by the company on the "grant of a lease at a yearly rent to the company which has "let the premises to a tied tenant at a yearly rent, with or "without a premium. We have not thought it necessary to "distinguish between cases where the company has let the "premises at a premium and where it has not, because the "annual equivalent of the premium received (where a premium "has been charged) is added to the rent in accordance with the "decision referred to in para. 3 hereof. The example given "in para. 7 (*a*) hereof is an example of this class of case."

Para. 7 (*a*) sets out the case with regard to a public-house or inn called The Red Lion in Ebury Street. There, by an indenture of July 16, 1923, the company was granted a lease of the premises for a term of nineteen years from Lady Day, 1923, at a premium of 1850*l*. and a yearly rent of 150*l*. The annual equivalent of the premium on the 5 per cent. Tables is 153*l*.

The premises were let by the company on a tenancy at a yearly rent without premium. The rent in the particular year selected was 252*l.* 14*s.* 10*d.* On that, the claim of the company is this, that you take the yearly rent paid by the company, 150*l.*, and you take the annual equivalent of the premium paid by the company, which is 153*l.* You thereby get 303*l.* You have to compare that (this at least is common ground as to the other side) with the rent received from the tied tenant, which is 252*l.* 14*s.* 10*d.*, and you thereby get a claim by the company for 50*l.* 5*s.* 2*d.* It is unnecessary to go through these things in detail.

The second case relates to a sum paid on the purchase by the company of an existing lease of premises which the company has let to a tied tenant at a yearly rent, with or without premium.

The third case relates to repairs and, as I gather (and I do not think this was disputed), those repairs were repairs of a capital nature.

The fourth case is a little complicated, though, in principle, I think it is the same, and it is only necessary to observe, in order to call attention to the fact, that in that case the claim of the company is to bring into account the annual equivalent of a loan made as long ago as December 22, 1905.

In these circumstances undoubtedly a difficult, and, I am bound to say I think, a rather unsatisfactory, position arises. There is one thing that appears to be perfectly clear and well settled, and it is this, that in making computations for the purpose of income tax capital expenditure is not allowed, and capital receipts are not to be brought in. That is thoroughly established. There have been many cases on the subject (frequently very difficult cases and cases which have reached the House of Lords), but those cases have been on the question whether a particular receipt is a capital receipt, or a particular payment is a capital payment, and I do not think the principle that, when you have ascertained that a particular sum is capital, it falls to be excluded from income tax, has been, or indeed can be, questioned. The cases are, of course, different; but the principle, I repeat, appears to be quite clear and thoroughly established.

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It would not, I think, be useful that I should go in any detail through *Usher's Wiltshire Brewery, Ld.*, v. *Bruce.* (1) The case there was examined in great detail in a series of elaborate speeches in the House of Lords. I propose to read only one passage: it is a well known passage from Lord Sumner's speech, and it seems to give the gist of the matter, so far as concerns rent foregone, which was the main, though not the sole, matter which was raised in *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1) There was a question of repairs in that case, and one question was whether a decision in a well known case, or in a case which at that time was well known, *Brickwood & Co.* v. *Reynolds* (2), was well decided, and it was ultimately held that that case was wrong.

With regard to repairs I would only make this observation, that the repairs which were in question in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) were clearly repairs of what one may conveniently call the nature of income. The outgoings for repairs there were not outgoings of a capital character. In that respect, as I understand the matter, they differed from the repairs which come into question in the present case.

When I diverged a moment ago on this matter of repairs I was just about to read a passage from Lord Sumner's speech which defines the issue on the main question (this question of rent foregone) which there arises. What he said was this: " Next as to the rent. A trader who utilizes, for the purposes "of his trade, something belonging to him, be it chattel or real "property, which he could otherwise let for money, seems to me "to put himself to an expense for the purposes of his trade. "Equally he does so if he hires or rents for that purpose property "belonging to another. The amount of his expense is prima "facie what he could have got for it by letting it in the one case, "and what he pays for it when hiring it in the other. Where "he gets something back for it, while employing it in his trade, "by receiving rent or hire for it in connection with that trade, "the true amount of his expense can only be arrived at by giving "credit for such receipt. In principle, therefore, I think that

(1) [1915] A. C. 433, 469; 6 Tax Cas. 399, 437.
(2) [1898] 1 Q. B. 95.

"in the present case rent foregone, either by letting houses, "which the brewers own, to tied tenants at a low rent instead of "to free tenants at a full rack rent in the open market, or by "letting houses in the same way, which they hire and then re-let "at a loss, is money expended within the first rule applying "to both of the first two cases of Sch. D, and that upon the "findings of the special case, which are conclusive, it is 'wholly "'and exclusively expended for the purposes of such trade.'" That, I think, as far as I am concerned, is enough about *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (1)

I turn to the other case (also a difficult case), *Hoare & Co., Ld.* v. *Collyer.* (2) There the difficulties are perhaps added to by the various matters which arose as that case went through the various Courts. The actual decision was that the premium received was a thing to be brought into account, and that the annual equivalent of it fell to be added to the rent received by the brewers. It was further held (and this was the main question when the case got as far as the House of Lords) that in considering the amounts to be allowed as deductions in respect of deficiency each tied house must be considered separately. That conclusion, which reversed the Court of Appeal on that point, was really reached by an application of the principle which had been then rather recently laid down in a very well known case, *Fry* v. *Salisbury House Estate, Ld.* (3)

It is necessary first to look at the judgment of Rowlatt J. It would be desirable anyhow to look at his judgment; it nearly always is, but it is the more necessary in this case, because on a passage in that judgment the Special Commissioners, as I will show in a few minutes, really based their decision in the present case.

Rowlatt J. discussed the matter, and he arrived at the conclusion that the premium in question in that case could not be brought into account. I will read a passage from the earlier part of his judgment, which shows the point. He says this: "Although in the case of houses leased by the "brewers it is probable that what they can deduct—I think the "Lords so treated it—is the rent they pay, yet it is quite clear "that in the case of annual value it is only the annual value "under Schedule A by statute that they can deduct. Therefore "you at once get an artificial limit brought in as to what they "bring in on one side, and the taking of this general account "seems to be very much hampered from that point of view too. "It seems to me that it is extraordinarily difficult to contemplate "working this system side by side with the special taxation of land "and premises under Schedule A, and I think Mr. Hills frankly "said if you do it, it does involve making allowances for taxes "under Schedule A. In other words, it involves this. It involves "taking all these houses out of Schedule A altogether and treating the thing as a trade, the houses merely being items of the "trade; just as an insurance company may be required by the "Crown to let its investments disappear from taxation under the "deducting Schedules and be brought in as receipts in a mere "trading account." Then he goes on in this way (1): "That "leaves this question. Although premiums cannot be brought "in, as I have said, as a subject-matter of taxation, I have not "hitherto considered them as different from rent. I have merely "said that you cannot bring in receipts as receipts by themselves. "But can anything be brought in except the rent of the house "itself to the extent of wiping out the deficiency? Can the "premiums be brought in to the extent of wiping out the "deficiency? Well now, I am bound to say I feel a good deal of "difficulty there when one is confronted with the facts. Here is "a brewer who says: 'I have a house worth so much, and it "'stands me, in one way or another, either as leaseholder or "'freeholder, in a charge of 100*l.* a year, and I am only getting 50*l.* "'for it, there is my loss of 50*l.*' You say: 'Besides getting 50*l.*, "'you are getting a substantial premium; do not talk about loss "'on this house.' Of course that appeals to one very much. "That is the difficulty which I respectfully think we have got "into by this step which has been taken in extending the "doctrine of the *Russell* case (2) to the case of the tenant, because

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(1) [1915] A. C. 433; 6 Tax Cas. 399.
(2) [1932] A. C. 407; 17 Tax Cas. 169.
(3) [1930] A. C. 432; 15 Tax Cas. 266.

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(1) 17 Tax Cas. 181, 182.

(2) 2 Tax Cas. 321.

"although in the House of Lords they only spoke of tenants "letting at a rent simpliciter, and landlords taking from a "superior landlord at a rent simpliciter, there is the other "circumstance which they never looked at, namely, where the "tenant may have paid a premium and where the landlord "himself, being a leaseholder, may also have paid a premium. "Now I have come to the conclusion that one cannot look at "premiums." (This passage is of vital importance.) "The "Attorney-General had to agree that if we are to look at "premiums received we must look at premiums paid. I cannot "conceive on the authorities how I can look at premiums paid to "swell the amount which is brought in as rent paid. I do not see "how I can possibly do that. It can only be brought in if you "are to look at these people as traders, not only in rents, but "as traders in property—which is the point I have already "expressed my opinion upon. Now if you cannot bring in the "premiums on the one side, I cannot conceive how you can "bring them in on the other. I think the Attorney-General "admitted it, and I think really that disposes of the question. "I do not think you can regard premiums at all. It is not a "satisfactory position, but there it is. They have taken so "much rent, and they have taken the premium, and in that "position the figures must be dealt with, it not being workable "to bring in premiums at all."

Then Rowlatt J. went on to deal with another point which, he said, was a more subtle and different point, and to that I shall have to make reference later in this judgment.

I said that I thought the difficulty was added to by the history of the case as it went through the Courts. I am not going to follow its every ramification, but, shortly put, that decision of Rowlatt J.'s, which was, of course, to the effect that premiums could not be brought in, was appealed against ; it went to the Court of Appeal, and the Court of Appeal directed that certain further facts should be found. It is necessary to refer to the facts. The first question they were asked to find was this : "Whether the premiums mentioned in the "first sentence of para. 4 of the said case, or any part of them "in any form as a matter of accountancy should be taken into "account for the purpose of ascertaining commercial profits "over any given period." To that the Special Commissioners answered : " The premiums should be taken into account in "ascertaining the commercial profits of the respondents' "business. The premiums apportioned over the respective "periods of the leases should preferably be treated as revenue "receipts, or alternatively, should be included in the rent "account for the purpose of ascertaining the balance of that "account to be brought into the profit and loss account of the "business." (1) When the case, and these further findings, came before it the Court of Appeal held that all the tied houses and receipts from them must be massed together and considered as a whole. That decision of the Court of Appeal was reversed by the House of Lords, and the reason for that reversal of the Court of Appeal, as I have already said, was that the House of Lords considered that the principle of *Fry* v. *Salisbury House Estate, Ld.* (2), governed the matter, and therefore the excess of rent could not be brought in. But the House of Lords in their speeches made it perfectly clear that the question (which by that time, in the process of going through the Courts, had apparently become really a subordinate question) whether premiums could be brought in must be resolved by saying that, in some form or other, they could be brought in. It is not necessary to refer in detail to the various passages which make that clear. It is perhaps worth reading a sentence from Lord Atkin's speech : he says this : " The only question seems to me "to be whether the tied rent plus the premium is in fact "less than the Schedule A valuation or the rent paid by the "appellants on freehold or leasehold houses respectively." (3) That passage, and other passages which might be read, I think, show that the House of Lords had not anticipated the difficulty which has subsequently developed, because they make it clear that, as they supposed, the comparison was to be

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(1) 17 Tax Cas. 190, 191.
(2) [1930] A. C. 432 ; 15 Tax Cas. 266.
(3) [1932] A. C. 418 ; 17 Tax Cas. 214.

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made between this figure, arrived at no doubt by bringing in the premium where there was a premium, on the one side, and the rack rent or Sch. A on the other side. They seem to me to make it clear that the comparison is between the sum paid by a tenant, that sum being increased by the premium, and the rent or the Sch. A value. It is not necessary, of course, to refer to the General Rule of Sch. A, which makes it perfectly clear that the general test is the full sum which would be paid by a tenant at rack rent.

Now I have to come to the actual problem which falls to be dealt with here, and I take the first and the main question that arises with regard to the premium. I think that the solution in that example is not that the premium is to be brought in as a premium, but that 150*l.* is not the rack rent. It seems to me, therefore, that what has got to be taken is what the premises would fetch at a rack rent. Similarly in (3.)—the matter with regard to the repairs—it seems to me that the solution there is not that capital repairs are to be allowed, which seems to me to be contrary to every principle of the income tax, but that those repairs, if they add to the value of the premises, will be reflected in the rack rent, if rack rent there is, or in the annual value of the premises. I cannot resist the view that to allow the claim—and indeed I did not understand that in the most skilful argument this was or could be questioned—would be to bring in to income tax computations capital expenditure, and that cannot, I think, be right. The solution of the matter, looking at the thing from the other side, may, I think, be as Mr. Hills in a most skilful reply, on which I desire to congratulate him, suggested, that what has to be allowed for is reduction of rent only by reason of the tie. The reduction of rent by reason of the fact that there is a premium is not a reduction by reason of the tie, and for that reason the annual equivalent of the premium must be added back. But, when one comes to the other side, no such difficulty exists, and it seems to me (and in this I am following verbally speeches in the House of Lords) that the rent or the annual value must be taken. It was conceded that, apart from the special question arising

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here, the rent or annual value, whichever is the higher, is the thing to be taken. If this view (and it is the view which on this most troublesome matter I have formed) is right, the principle is maintained that capital payments and receipts are not taken into account. On the one side the premium is considered only to arrive at the figure of rent foregone by reason of the tie. On the other side of it, the comparison is with annual value or rent. The case no doubt is one of unusual difficulty, but on the whole I think the Commissioners made a mistake in applying and following, as they did, the dictum of Rowlatt J. in *Hoare & Co., Ld.* v. *Collyer*. (1) It is not necessary for me to say how anxiously I should consider and how willingly I should follow any dictum of Rowlatt J.; but it is necessary to point out that this dictum was delivered in a judgment which was subsequently held, both in the Court of Appeal and in the House of Lords, to be wrong. I would further point out that in the very passage upon which the Commissioners place reliance Rowlatt J., with much emphasis, said this: "I cannot conceive on the authorities "how I can look at premiums paid to swell the amount which is "brought in as rent paid. I do not see how I can possibly do "that." (2) It appears that Rowlatt J., thinking, as we must now assume, erroneously, of course, that a premium could not be brought in on either side, was emphatic in the view that the premium now claimed could not be brought in. Unless I misinterpret the language of the Special Commissioners, I think that in allowing the appeal I am deciding as they would have decided if they had not felt themselves fettered by the dictum. Be that as it may, I have, of course, to do my best in this difficult matter to consider the question and to consider it on principle. The conclusion at which I arrive is that the principle that what you take is annual value or rack rent must be maintained, and that none of the allowances claimed can be allowed.

For these reasons I arrive at the conclusion that the decision of the Special Commissioners, based, as I think it was, entirely upon the dictum of Rowlatt J., was wrong, and the appeal of the Crown must be allowed with costs.

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(1) [1932] A. C. 407; 17 Tax Cas. 169.

(2) 17 Tax Cas. 182, 183.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Godden, Holme & Ward.*

A. W. G.

C. A.

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June 22, 23.

ROACH *v.* YATES.

[1936. R. No. 1928.]

Damages—Negligence—Personal injuries—Injured person rendered permanently incapable of looking after himself—Claim for loss of wages, nursing expenses, physical and mental pain and suffering, and shortened expectation of life—Measure and mode of assessment of damages.

In a collision between a pedal bicycle ridden by the plaintiff, a bricklayer thirty-three years of age, and a car driven by the defendant, occasioned by the negligence of the latter, the plaintiff sustained serious injury to the brain rendering him permanently, not only unfit for work, but incapable of looking after himself and dependent both day and night upon the care of a nurse, and shortening his expectation of life from thirty to sixteen years. At the time of the accident the plaintiff was earning an average wage of 3*l.* 10*s.* a week. The plaintiff having brought an action against the defendant for damages for personal injury, it was agreed between the parties that the plaintiff's pecuniary losses and expenses by reason of the accident down to the date of the action amounted to 542*l.*, and in respect thereof and of all his other damages past and prospective the trial judge awarded him the sum of 2742*l.* in all. The plaintiff, being dissatisfied with that sum, appealed:—

Held, by the Court of Appeal, that in assessing the amount due to the plaintiff a proper, though not necessarily the only, method to adopt was to allow him (i.) in respect of his pecuniary losses and expenses down to the date of the action the said agreed sum of 542*l.*; (ii.) in respect of his prospective loss of wages the sum which he would have earned during what, but for the accident, would have been his normal life according to actuarial tables, subject to deductions for all contingencies, that sum to be not less than 2000*l.*; (iii.) in respect of nursing attendance, a sum sufficient to cover a reasonable weekly payment for that purpose during the period of his life as shortened by the accident, that sum being estimated at upwards of 2000*l.*; and (iv.) in respect of his past and future physical and mental pain and suffering, and the shortening of his life, a sum, in estimating which the following considerations should be kept in view, namely, that no amount of money, however large, could fully compensate the plaintiff for these injuries, and that the most that could be done was to award him such compensation as was reasonable in all the circumstances of the case, and, further, that no deduction should be made from that compensation because of the fact that in consequence of the accident his condition was such that he might be either incapable of appreciating that his life had been shortened, or even glad that it had been shortened and that his sufferings would the sooner come to an end; and that in respect of all these matters the plaintiff was entitled to a sum of 6542*l.*

Rowley v. *L. & N. W. Ry. Co.* (1873) L. R. 8 Ex. 221 and *Phillips* v. *L. & S. W. Ry. Co.* (1879) 5 Q. B. D. 78, considered, applied and observations adopted.

Flint v. *Lovell* [1935] 1 K. B. 354 considered and followed.

APPEAL from the judgment of Hilbery J. in an action tried by him without a jury.

William Roach, a bricklayer, thirty-three years of age (hereinafter called "the plaintiff"), resided at Twickenham but was employed in work at Slough, in the county of Buckingham, between which places he travelled daily on a pedal bicycle. He took an interest in a sports club and found very great pleasure in active exercise.

On November 22, 1935, as the plaintiff was cycling along the Colnbrook by-pass road near Iver, a collision took place between his bicycle and a motor-car driven by Mr. Henry Yates (hereinafter called "the defendant").

As a result of the accident the plaintiff sustained most serious personal injuries, for which he received medical treatment at first in hospital and afterwards at home, and which made it necessary that he should receive constant nursing and attention day and night for the rest of his life.

On October 12, 1936, the plaintiff brought the present action against the defendant, claiming damages for personal injuries and consequential loss and expense sustained by him owing to the negligence of the defendant.

The plaintiff alleged in his statement of claim (para. 2) that the collision was caused by the negligence of the defendant; the particulars of the alleged negligence being as there stated; (para. 3) that by reason of the premises the plaintiff suffered severe personal injuries and other damage, that his expectation of life had been shortened, and that he was permanently incapacitated from following any employment; the particulars of his injuries being that he had sustained a blow on the left forehead with severe injury to the brain, a bruise on the left hip and scratches upon the chest, that he was rendered unconscious, that he developed broncho-pneumonia, bronchiectasis, and pressure sores, and that he had suffered and would suffer from traumatic dementia, traumatic epilepsy, incontinence of urine and fæces, sexual impotence, headaches, giddiness, excessive thirst, fibrosis of the lung and weakness of the right leg, and the particulars of special damage included, among other things, loss of wages of the plaintiff himself, loss of wages of the plaintiff's wife, Mrs. Katheleen Roach, who had to give up her employment at a confectioner's shop in order to nurse the plaintiff, loss of wages of the plaintiff's sister-in-law, Mrs. Deans, who had to give up her employment in order to assist the plaintiff's wife, and expenses of medical and surgical treatment ; that the items claimed for the said losses of wage were continuing ; that further expenses would be incurred for medical and surgical treatment ; and that the plaintiff claimed damages.

The defendant in his defence stated (para. 1) that the alleged negligence was admitted ; and (para. 2) that the alleged injuries, loss, damage, and other matters alleged in para. 3 of the statement of claim were denied.

The action was tried on January 19, 1937.

The description of the plaintiff's injuries in the particulars under para. 3 of the statement of claim was not disputed by the defendant.

On behalf of the plaintiff certain medical reports on his condition, incorporating the hospital reports, were put in evidence, and these were admitted on behalf of the defendant.

Oral evidence on behalf of the plaintiff was given by his wife.

No evidence was given on behalf of the defendant.

The evidence, so far as material, and the findings based thereon are stated below in the judgment of the learned trial judge, which was substantially as follows :—

HILBERY J. In this case the plaintiff was knocked down and injured through his bicycle coming into collision with a motor-car driven by the defendant. Responsibility for the accident is accepted by the defendant, and no sort of negligence on the part of the plaintiff is suggested. [His Lordship stated the admitted facts as above set out, and continued as follows :] The injuries which the plaintiff received in the accident are principally injuries to the left frontal lobe of the brain, which, as the eminent doctor whose report I am reading from says, is the site of the highest mental functions. The concussion and the unconsciousness which supervened brought on bronchial pneumonia in one of his lungs. The condition in which he is to-day appears from the agreed medical reports and from the evidence of the plaintiff's wife. As a consequence of his injuries he is suffering from traumatic dementia. He is less capable now of looking after himself than a normal child. He has a vacant expression; he does not speak spontaneously; his memory is grossly defective; he is listless and takes no interest in any matters which usually are of interest to a man in his position. His sense of smell is lost in both nostrils. There are signs of fibrosis at the base of the right lung. He suffers from traumatic epilepsy, having on the average one fit a week, and that state of affairs is unlikely to improve. He has almost continuous severe headaches associated with pain at the back of the neck. The fits come on in his sleep. He screams like a trapped animal, clenches his fists, and then has a fit with involuntary micturition. He has an excessive thirst and appetite, with the result that he passes an unusual quantity of urine, and suffers from an increasing obesity, having put on some seven stones since the accident. He has a cough which is due to the fibrosis of the lung. He cannot be left alone but requires continual attention night and day, and he is permanently and totally incapacitated for any form of work.

The last medical report points out that there are now three factors which seriously reduce his expectation of life—namely, his mental state, his frequent convulsions, and the condition of his right lung. The normal expectation of life of a healthy man of his age is about thirty-three years. The doctors think it reasonable to conclude that in his case it has been reduced by at least half—I stress the words "at least." The doctors say, further, that he has suffered much pain in the head and giddiness, and that though the fits are not at the time a source of pain, yet he is ill on each day following a fit. His wife told me that after the fit he passes into deep sleep, but that on waking next morning he suffers from an acute headache and has to remain in bed all day. Owing to the state of his mind he is subject to a constant fear of germ infection of some sort. His mental condition also renders him excessively irritable, and liable when out of doors to indulge in violent conduct towards people for no proper reason.

He was earning what is now agreed to be an average wage of 3*l.* 10*s.* a week. The cost of his illness and the loss of wages down to the present time are not in dispute, and these items amount to 542*l.* In addition, I have to settle as well as I can what should be awarded to him as compensation. I have to assess now, once and for all, what sum must be given to compensate him for the suffering which, as a result of this accident, he had already endured and will be called upon to endure for the rest of his life. Not only must he be compensated for actual and positive suffering, but also for the more negative loss to him for the future of all that pleasure of living which, as a healthy man, he might have expected. I have to reduce into terms of money what should be given as compensation for all that this man has suffered and lost, and for all that he must suffer and lose for such period of life as remains to him. It is right, with regard to the decision of the Court of Appeal to which I have been referred, that I should take into account, too, that his expectation of life has been seriously diminished; but I myself in this case think that his mental condition is such that it is very doubtful whether he appreciates very much, if at all, the fact that his expectation of life is diminished. I think his condition is such that if he truly spoke upon the topic at all he might truthfully enough say that he was glad to think that his expectation of life had been diminished as much as possible. I thus find it a little difficult to deal with that head of damage, although I do take it into account and deal with it as best I can. Then in the future he will, of course, have all the expense of providing people to look after him, either by getting his wife and his sister-in-law to do so as long as they can at a sacrifice of such wages as they are able to command, or by paying for nurses or for accommodation in some institution. All these things I have to take into account. At the same time it has to be borne in mind that in such a case as this the Court cannot in general give full compensation, and should not endeavour to do so. In *Rowley* v. *London and North Western Ry. Co.* (1) Lord Esher said that the Court " must not attempt " to give damages to the full amount of a perfect compensa- " tion for the pecuniary injury, but must take a reasonable " view of the case, and give what they consider, under all the " circumstances, a fair compensation," and that passage was cited with approval by Greer L.J. in *Rose* v. *Ford.* (2) I must assess the figure as well as I can, remembering that what I have to do is to give back the amount of the actual damage, to provide for the additional expense and loss to which the plaintiff will be put in the future, and to award compensation for the pain and suffering which he has endured, and must still endure. Doing the best I can and having regard to the fact that his actual loss amounts so far to 542*l.*, I award the plaintiff 2750*l.*

The plaintiff appealed. The appeal was heard on June 22 and 23, 1937.

Beyfus K.C. and *Humfrey Edmunds* for the plaintiff, appellant.

F. J. Tucker K.C. and *N. R. Fox-Andrews* for the defendant, respondent.

[The questions discussed in argument sufficiently appear from the judgments.]

GREER L.J. This is an unfortunate and a difficult case. I think it is the first case in which this Court has had to take upon itself the extremely hard task of estimating the damages that should be given to a man injured in an accident, whose life has been shortened and whose career has been ruined by his having been turned into a useless member of society who cannot earn any wages. We have an arduous duty to perform, but we must perform it. Where the trial of such a case has been before a judge alone and this Court is rehearing the case, it is not only entitled but, I think, is bound to assess the damages which it thinks proper to be awarded in respect of the facts of the case.

(1) L. R. 8 Ex. 221, 231.

(2) [1936] 1 K. B. 90, 102.

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I do not think it necessary to go all through the evidence as to the results to this unfortunate plaintiff of the accident which admittedly happened to him through the negligence of the defendant, or negligence for which the defendant is responsible. I accept in toto what the learned judge says has been established by the medical and other evidence in the case as to the kind of life that the healthy, athletic and enjoyable life of the plaintiff has been converted into by reason of injury to his brain through that negligence. It is not easy to put a figure on what the plaintiff has lost by having been changed from a healthy, athletic man, who enjoyed his life, into an almost hopeless lunatic, a man who for the rest of his life will be bound to have nursing attendance day and night, who cannot be left alone, and whose physical powers have been so interfered with that he no longer has control over his own interior economy.

I accept all that the learned judge has said in admirable and appropriate language about the evidence and the facts. I think, however, that he made one unfortunate mistake when, in dealing with one of the questions which arose in the case, he said in the course of his judgment: " It is right, with " regard to the decision of the Court of Appeal to which I have " been referred "—that is the case of *Flint* v. *Lovell* (1), as interpreted by the case of *Rose* v. *Ford* (2)—" that I should " take into account, too, that his expectation of life has been " seriously diminished; but I myself in this case think that " his mental condition is such that it is very doubtful whether " he appreciates very much, if at all, the fact that his expectation of life is diminished. I think his condition is such that " if he truly spoke upon the topic at all he might truthfully " enough say that he was glad to think that his expectation of " life had been diminished as much as possible." It seems to me that the learned judge, unfortunately, went wrong when he made that statement. What he had to consider was not whether the plaintiff's desire of life after the accident had become diminished so that he would have been glad to be dead, but whether the length of life which he would have been entitled to anticipate that he would have had, if the accident had not happened to him, had been diminished by reason of the accident. If the learned judge had made the statement to which I have referred in the course of summing-up the case to a jury, it appears to me that we would have had to order a new trial on the ground of a misdirection. I think he misdirected himself upon one of the questions which fall to be decided in view of the decision in *Flint* v. *Lovell* (1)—namely, whether in assessing the compensation the Court ought not to take into consideration the reduction of the plaintiff's expectation of life by reason of his serious injuries.

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(1) [1935] 1 K. B. 354.

(2) [1936] 1 K. B. 90. The decision in this case was subsequently reversed, but *Flint* v. *Lovell* was approved by the House of Lords [1937] A. C. 826.

The injuries which this man suffered were injuries to the brain which make it necessary that he should have day and night the services of some nurse or friend to look after him. He can get those services, and perhaps get them better than in any other way, from the attendance which is being given to him by his wife and his sister-in-law; but he would naturally feel that he ought to compensate them for what they have lost by giving up the work at which they were earning the sum of 3*l*. a week. I think that Mr. Beyfus was right in saying that we must take into account, at any rate for the period during which the plaintiff may now be expected to live, the sum of 3*l*. a week as the minimum expense which the plaintiff would have to incur in retaining the nursing services of his wife and his sister-in-law. I say that is the minimum sum, because it might well be that these two devoted attendants would not be able to continue to look after him, and then he would have either to employ day and night nurses or to go into some institution, where he would have to pay the costs of his attendance day and night by the nurses in that institution. I do not think we are entitled to take into account that he might be thrown upon the mercy of charitable institutions, because no such suggestion was made in the course of the case. What will the cost of nursing him during that period come to ? It is difficult to estimate the sum, but I am inclined to take the view

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(1) [1935] 1 K. B. 354.

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that the cost to him of having to compensate his wife and sister-in-law for the loss they would sustain during his life by reason of this accident cannot be underestimated at a sum approaching, at any rate, the figure of 2000*l.*, and I accordingly take that as the expenditure that he will be put to for nursing attendance.

One has to estimate also what his loss of wages would be. The learned judge took that into account, but I do not think he gave a figure which could be adequate to cover the loss the plaintiff must sustain by not being able to earn any wages whatever, that being his condition in the final opinion of all the doctors who were called before the learned judge.

It is further necessary to compensate him for the terrible injuries he has sustained, for his pain and suffering, for his loss of expectation of life, for the mental suffering that he will inevitably undergo, and for the physical disabilities, which I think the learned judge found would at any rate last for the period of his shortened life.

In the case of *Flint* v. *Lovell* (1) I ventured to say this in the course of my judgment (2): " I think we ought to accept " the judge's finding that by reason of the accident the " plaintiff's future was reduced to pain and suffering for a " year with a certainty of additional medical and nursing " expenses, and the high probability that by reason of the " injuries caused by the defendant's negligence he would be " dead within a year. If it was open to the judge to take into " account the probability of early death, though this is a " border-line case, I do not think it can be said that the " damages which he awarded, though somewhat on the " generous side, are such that the Court of Appeal ought to " interfere with his decision and reduce the damages." Then I say, referring to the rule about no action being based on the death of another person (3): " Having regard to the peculiar " origin of the rule, I have come to the conclusion that it has " no application to a case in which a plaintiff still living at " the date of the trial is asking for damages on the ground

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(1) [1935] 1 K. B. 354.

(2) Ibid. 358.

(3) Ibid. 359.

"that he has not only suffered severe pains of body and mental "disquietude through the prospect of an early death, but also "claims that what might have been an eight to ten years' "pleasant life in which he could have carried on his normal "activities has been converted into a precarious tenure not "likely to exceed twelve months, during which he will continue "to suffer severely as the result of the wrong of which "he complains."

The rules which have been laid down with regard to the decision of juries are these: A new trial will be ordered if it is clear that the jury have not taken into consideration some matters that they were bound to take into consideration, or have taken into consideration some matters which they were not entitled to take into consideration, or where, on the whole, they have taken an erroneous view of the damages which ought to be awarded. I have said—I think it was in the case of *Rose* v. *Ford* (1)—that those rules ought, as a general principle, to guide this Court in dealing with the question of an appeal on damages, although, of course, an appeal on damages to this Court is just as much a retrial on that question as on any other question.

The learned judge has given the plaintiff, in addition to his special damage up to date, the sum of 2200*l.* That seems to me to be quite inadequate. In the circumstances, it is impossible to say that the learned judge has given sufficient compensation for the injuries which were sustained by this unfortunate man.

I am quite satisfied by the facts proved in this case, and by the argument to which we have listened, that the learned judge did come to an erroneous conclusion as to what the damages ought to be. It is very difficult to assess them in this case, because it is not possible, by any amount of money, to compensate a man who has been subjected to the injuries and sufferings that this man has endured and will endure. If the Court gave him 10,000*l.* or 20,000*l.*—which, I think, was given in one case by a learned judge—it would not be giving him something that he would rather have than the continuance

(1) [1936] 1 K. B. 90. (Reversed on another point [1937] A. C. 826).

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of his healthy life. In my judgment one cannot estimate the damages on that basis; one must take a reasonable view of all the matters which have to be considered, and come to a conclusion upon that basis.

It is said that the case of *Rowley* v. *London and North Western Ry. Co.* (1), to which we have been referred, ought not to be treated as a guide in determining what ought to be given by way of damages in a case of this sort, because in *Rowley's* case (1) the learned judge had only to consider the value of a lost annuity, and the Court said that the value of a lost annuity is necessarily the cost of replacing it by another annuity of the same value. In the course of his judgment Brett J., however, said (2): " They (i.e. the jury) must not " attempt to give damages to the full amount of a perfect " compensation for the pecuniary injury, but must take a " reasonable view of the case and give what they consider " under all the circumstances a fair compensation." It may well be that in an annuity case, if one were to rely upon *Rowley's* case (1), it would not be right to diminish the damages by reason of the guiding rule laid down by Brett J. In the case of *Phillips* v. *London and South Western Ry. Co.* (3), however, that view of Brett J. was accepted as applicable to a case which was not a case of an annuity, but was a case of damages at large and not for the loss of an annuity. There, in the course of the argument, James L.J. said (4): " The proper direction to " the jury, as it seems to me, would have been to tell them to " calculate the value of the income as a life annuity, and then " make an allowance for its being subject to the contingencies " of the plaintiff retiring, failing in his practice, and so forth." I come to the conclusion that the effect of that observation, which was accepted and repeated in substance in the judgment of James L.J., is that we have not to give what will be an absolute and perfect compensation for all the injuries which the unfortunate plaintiff in this case has suffered. We are not to give him as damages the price that he would have accepted in exchange for the life he preferred to go on living.

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(1) L. R. 8 Ex. 221.
(2) Ibid. 231.
(3) 5 Q. B. D. 78.
(4) Ibid. 84.

Taking all these matters into consideration, I am quite satisfied that the learned judge did take an erroneous view of the compensation to which this unfortunate man was entitled. There is no question about the amount of the damages attributable to the loss of wages and expenses up to the date when the trial took place; they were assessed by the learned judge at 542*l*. In addition there is compensation payable for the other damages and losses which have been discussed this morning. My learned brothers and I have to decide what sum in all shall be awarded in this case as damages to this unfortunate man, and we have come to the figure of 6542*l*. That is the sum which, independently, each member of this Court thinks is a proper sum to award in this case.

For these reasons the appeal will be allowed; the judgment of the learned judge reversed, and judgment entered for the plaintiff for 6542*l*.

SLESSER L.J. I agree, and in so far as we are differing from Hilbery J. in his estimation of the damages, and have to take upon ourselves the burden of assessing them, I think it is right that I should add my reasons for agreeing.

As my Lord has said, it is necessary, if we are to disturb the estimation of the damages of the learned judge, that we should satisfy ourselves that he has proceeded upon an erroneous basis. In my view his estimation of the damages here, upon the facts as found and stated by himself, proceeded, at least in part, upon an erroneous view, and it becomes necessary for this Court, dealing with the matter by way of rehearing, to reconsider the basis upon which to assess the damages in such a case. The sum which he has awarded, apart from the special damage, is in the neighbourhood of 2200*l*.; but when the facts of the case, as found by the learned judge, are considered, it is evident, I think, that the damage which of necessity flows from those facts, taking into account every reasonable contingency and making no unreasonable assumption in respect of the injured man, must come to a very much larger figure.

Apart from the actual loss and expenditure of 542*l*., the damages in this case fall into two principal groups—on the one hand the actual pecuniary loss in money which it may reasonably be held the plaintiff will have to incur as a result of the accident, and on the other hand the more uncertain loss arising from the pain and suffering, the shock and the misery, and the loss of the expectation of what has been found by the learned judge to have been a vigorous, happy and healthy life. With regard to the pecuniary loss, that again falls into two groups: the loss of wages, and the expenses to which, in his present condition, he must inevitably be put in order that he should be maintained alive.

First, then, the plaintiff's loss of wages may be noticed. Criticism has been made of the suggestion that one method of estimating his loss under that head is to consider what he would have earned during his life. Speaking for myself, I see no justification for approaching that problem by starting with the assumption that he would only have lived so long as the accident has now allowed him to live. I think the proper way of approaching the problem is that which was followed in *Phillips* v. *London and South Western Ry. Co.* (1), the leading case on this matter—namely, first to consider what sum he would have been likely to make during his normal life if he had not met with the accident. This was a man thirty-three years of age, and according to the actuarial expectation of life of a healthy man of that age, which is, at any rate, something to start with, he would have lived, if he had not met with this accident, and although he would have met with all the other risks of life, for probably upwards of another thirty years. On that hypothesis it is said for the respondent that it is nevertheless wrong, in trying to find out what capital sum would bring in the wages he would have earned but for the accident, to have any recourse to annuity tables and the like.

I do not, however, understand Mr. Beyfus to say that when one has arrived at a figure based on annuity tables one is not to make the proper discounts and deductions for contingencies of every kind; but only to say that the use of tables subject to deductions is, at any rate, a method by which one can capitalize the sum he may now receive at once, in place of

(1) 5 Q. B. D. 78.

separate weekly instalments for the rest of his life. That is not the only method which is open to the Court, but that it is a permissible method appears to be evident from the case of *Phillips* v. *London and South Western Ry. Co.* (1) to which I have referred. James L.J. there said (2): "The proper direction to "the jury, as it seems to me, would have been to tell them to "calculate the value of the income as a life annuity, and then "make an allowance for its being subject to the contingencies "of the plaintiff retiring, failing in his practice, and so forth." In his judgment James L.J. uses language which shows that he has accepted the principle in coming to the conclusion that the damages which had been awarded by the jury were too small, and the rest of the Court concurred. That does not mean that one must not have regard to all the reasonable contingencies of life.

In the present case, for example, one is not to assume that the plaintiff would have necessarily gone on earning the same wage for the rest of his life, and I think that it is probably right to assume that he would never have earned any more, having regard to the fact that there is no evidence that he would, although in many cases the question of the injured man's prospects improving would be a proper subject-matter for consideration. However the matter be looked at, and whatever discount be made, it seems to me that in one way and another it would not be right to say that the plaintiff might not reasonably have expected, had he not met with this accident, to earn in all during the next thirty years less than a sum in the neighbourhood of 2000*l.*

Secondly comes the question of the plaintiff's maintenance. The learned judge has accepted as a fact that this man will need night and day attendants during the sixteen years for which doctors think he may be expected to live. Whether his attendants will continue to be his wife and his wife's sister, whether those devoted women may break down under the strain of this duty, or may die, and whether in that case any other nurses will have to be employed, are all matters to be considered. I think the sum of 3*l.* a week, which has been suggested as a remuneration for attendance on this unfortunate man by two attendants day and night, is a reasonable and very moderate remuneration for that service. Taking it on that basis for sixteen years, and adding the wages which he has lost, we arrive in respect of these items alone at a sum considerably larger than that which the learned judge has allowed for the total damages in this case. That fact alone seems to me to show that the award of damages by the learned judge cannot stand.

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(1) 5 Q. B. D. 78. (2) Ibid. 84.

Then, as Mr. Beyfus has pointed out, there are other matters which the judge has to take into consideration. He must make an award of compensation for pain and suffering. Further, consonantly with the case of *Flint* v. *Lovell* (1), if he has found that this man was living a healthy, happy and vigorous life, he is bound to give him something for the shortening of that life by reason of the accident. I agree, and wish to associate myself, with what has been said by my Lord to the effect that the approach of the learned judge to this matter of the plaintiff's expectation of life cannot be defended. In his judgment he says that he will take into account that the plaintiff's expectation of life has been seriously diminished, as, indeed, he has been told to do by this Court, and then he says: "I myself in this case think that "his mental condition is such that it is very doubtful whether "he appreciates very much, if at all, the fact that his "expectation of life is diminished. I think his condition is "such that if he truly spoke upon the topic at all he might "truthfully enough say that he was glad to think that his "expectation of life had been diminished as much as "possible." That is to say, as I understand the learned judge, that if by reason of the accident the man is reduced into such a state of misery that he does not wish his life to continue, it is no longer open to him, although the evidence was that but for the accident he would have wished his life to continue and would have enjoyed it, to rely upon a situation which has been destroyed as regards its attractive qualities by the very act of the defendant of which he complains.

(1) [1935] 1 K. B. 354.

Flint v. *Lovell* (1) was a case based upon its own particular facts. In that case the learned trial judge found in terms that the injured man had the prospect of an enjoyable, vigorous and happy old age, and my Lord in his judgment similarly pointed out that the learned judge said: "There is no doubt that he "has lost the prospect of an enjoyable, vigorous and happy old "age which I am satisfied on the medical testimony might "have gone on for a number of years if this unhappy accident "had not occurred." We are not to speculate as to what would be the result in a case where the evidence was that the person injured was either of an atrabilious temperament, or a follower of the philosopher Schopenhauer, or of suicidal tendency. *Flint* v. *Lovell* (1) was the case of a man who wished to live a happy life but for the accident. If the evidence is that the loss of the desire to live is due to the accident itself, that is not a ground on which the defendant can say: "I have reduced this man to a nervous wreck "and he does not want to live, and therefore I need not pay "him compensation because he would have wanted to live "if I had not so reduced him." I therefore agree with my Lord that on that point there has been a misdirection. However the matter may be put, I think the plaintiff is entitled in the circumstances to damages on that head. I agree with Mr. Tucker that care must be taken that the plaintiff is not compensated twice over, once on the basis of the wages which he would have received in the future if his life had extended to its normal period, and also for the loss of the expectation of life.

Taking all these matters into consideration, I come to the conclusion that the award of the learned judge in this case is only approximately a third of that to which this man, on any view, is entitled; and therefore that it cannot be supported, and I agree that the damages should be as stated by my Lord.

MACKINNON L.J. I agree.

Appeal allowed. Judgment varied.

Solicitors for appellant: *Barlow, Lyde & Gilbert.*
Solicitors for respondent: *Ponsford & Devenish.*

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(1) [1935] 1 K. B. 354.

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March 22, 23.

CLELLAND *v.* EDWARD LLOYD, LIMITED.

[1936. C. 1747.]

Master and servant—Negligence—Independent contractor working on defendants' premises—Apprentice in defendants' service ordered to work under contractor's foreman—No request or agreement by contractor for loan of apprentice's services—Negligence of apprentice causing injury to contractor's servant—Liability of defendants.

The defendants were occupiers of paper mills on which an independent contractor, the E. Company, was installing an electrical power plant. The defendants instructed M., one of their own electrical apprentices, to work with the E. Company's men under the E. Company's foreman, J. This instruction was not given in response to any request from or agreement with the E. Company for the loan to them of M.'s services, but was merely a part of M.'s training in his trade. By J.'s orders, M. erected a platform to enable the plaintiff, one of the E. Company's men, to reach his work. M. used a defective plank (not supplied by the defendants) which broke, causing injury to the plaintiff:—

Held, (1.) that the defendants were not liable as occupiers of the premises; but (2.) that since M. was not working with the E. Company's men in response to any request from or under any agreement with the E. Company, he remained the servant of the defendants, who were therefore liable to the plaintiff for his tortious act.

Bain v. *Central Vermont Ry. Co.* [1921] 2 A. C. 412 and *Donovan* v. *Laing Syndicate* [1893] 1 Q. B. 629 distinguished.

Action tried by Goddard J.

The defendants, Edward Lloyd, Ld., were the owners of paper mills at Sittingbourne, and in 1935 they were erecting a new power house for the electrical equipment for working the mills. The actual structural work was done by themselves, but the electrical installation was carried out by two companies, the English Electric Company and Electroflo Meters Company, Ld. It did not appear whether the Electroflo Company was a sub-contractor of the English Electric Company or a direct contractor with the defendants, but it was clear that the workmen of the Electroflo Company were invitees on the defendants' premises.

The Electroflo Company were short of men, and by arrangement with Edward Lloyd, Ld., some men, including the plaintiff, John Smith Clelland, were borrowed from the Kent

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Electric Power Company, so that, for the purpose of the work at the defendants' premises, the plaintiff, who was ordinarily in the service of the Kent Electric Power Company, was temporarily in the service of the Electroflo Company. The Electroflo Company had on the premises a foreman named Jackson.

On August 17, 1935, the plaintiff, who was wiring an instrument board, sustained serious injuries through the breaking of a plank in the scaffolding on which he was standing. This scaffolding had been put there by an electrical apprentice of the defendants named McLeod. It was the custom of the defendants, when electrical contractors were at work on the premises, to tell their electrical apprentices to work with the other electricians, and McLeod was working under the orders of Jackson. It was on Jackson's instructions that he had put up the scaffolding for the plaintiff, one plank of which proved defective.

In an action by the plaintiff against the defendants based on negligence and/or breach of statutory duty, it was sought to make the defendants liable (*a*) as the occupiers of the premises on which a dangerous scaffolding existed; (*b*) as the employers of McLeod through whose tortious act the accident happened.

The defendants denied the negligence and breach of statutory duty, and alleged that at the time of the accident the Electroflo Company were the employers of McLeod, and that they and not the defendants were liable.

Glyn-Jones for the plaintiff. The liability of the defendants may be put on two grounds. First, as occupiers of the premises, having the legal control of the whole premises, they are liable for injury caused to invitees by the presence there of a scaffolding or platform which is dangerous. Secondly, they are liable for the tortious act of their servant McLeod. It is true that in *Bain* v. *Central Vermont Ry. Co.* (1) and in *Donovan* v. *Laing Syndicate* (2) it was held that the servant in such a case was in the service of the temporary master to whom his services had been lent by his regular employer, and that it was suggested that it did not matter that the loan was gratuitous. But those cases are distinguishable. In both of them, and in all the decided cases on the subject, there was either an agreement between the two employers for the loan of the servant or at least an antecedent request by the temporary employer for his own benefit. Here McLeod was working with the Electroflo Company's men, not in response to any request by the Electroflo Company (who had already got the men from the Kent Company, and would hardly have asked for an apprentice if they had wanted another man), but for McLeod's own benefit in seeing how the job was done by Jackson, and indirectly for the defendants' benefit in getting their apprentice taught his work. In those circumstances it is submitted that he never ceased to be the defendants' servant, and that they remain liable for his negligence.

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(1) [1921] 2 A. C. 412.

(2) [1893] 1 Q. B. 629.

Sellers K.C. and *James MacMillan* for the defendants. The plaintiff puts his first proposition far too widely. The liability of an occupier does not extend to the acts of an independent and competent contractor over whom he exercises no control. Here the defective board was not supplied by the defendants, nor did they give any direction to the Electroflo Company how and where they should erect scaffolding. They cannot therefore be liable merely as occupiers because the Electroflo Company erect a defective platform. As to the second point, *Bain* v. *Central Vermont Ry. Co.* (1) and *Donovan* v. *Laing Syndicate* (2) are directly in point. It may be that there was in those cases an agreement or request for the loan of services, but the ground of the decisions was that the temporary employer was the person having the right to control the work of the servant at the time. Here the platform was put up by McLeod on the orders of Jackson, and Jackson, on behalf of his employers the Electroflo Company, was the person who had the right at that time to control McLeod's work, and the duty to supervise it and see

(1) [1921] 2 A. C. 412.

(2) [1893] 1 Q. B. 629.

that it was done properly. The liability for the result of McLeod's negligence ought therefore to fall on the Electroflo Company.

GODDARD J. This is an action brought by John Smith Clelland against Edward Lloyd, Ld., to recover damages for personal injuries sustained while he was working at Edward Lloyd, Ld.'s premises, engaged in doing certain electrical work. The case is an interesting one and it raises some difficult questions, I think, in regard to the liability of an occupier of premises and the law of master and servant. I do not mind admitting that my mind has fluctuated somewhat during the course of the argument.

[His Lordship dealt with the facts and the evidence, finding that the scaffolding from which the plaintiff fell was put in position by McLeod at the orders of Jackson. He then continued :]

Now is there liability in Edward Lloyd, Ld. ? Mr. Glyn-Jones' first point is this. He says there was a scaffold or a platform, on Edward Lloyd, Ld.'s premises, which was composed of improper material, and therefore, prima facie, they are liable because they are the occupiers of the place where the platform was. I think that is putting it a great deal too high. It is quite true that Edward Lloyd, Ld., were the occupiers and had the legal control of the building, but they had employed competent contractors to do some work in their building. In the course of doing that work those contractors made use of some planks which were not supplied by Edward Lloyd, Ld., for that purpose, and there is no suggestion that they asked Edward Lloyd, Ld., to put them there. I think they were obviously there for the purposes of this electrical work. Edward Lloyd, Ld., would not interfere with the electrical work; they left it to the electrical contractors to do their work as they chose. Edward Lloyd, Ld., did not control them in doing the work, or say whether a scaffold must be put here or there. They did not put up scaffolding for anybody to work on. I cannot find any ground upon which I can say that because some boards are found upon a man's premises in a certain position when work is going on under two contractors in the place, and those boards are unsafe, there is a liability upon the owner of the premises. As I put it in the course of the argument, if I have two lots of workpeople working in my house, a builder and decorator doing the painting in my drawing-room, and an electrical contractor doing electrical work, and the builder erects a stage in the drawing-room, and the electrical contractor's man comes in and sees it and gets on to it and uses it and it breaks, it seems to me that it would be an extraordinary doctrine if it were said in those circumstances that because I had control of the premises I was liable. I do not find here any grounds upon which, on that part of the case, I can infect Edward Lloyd, Ld. with liability.

Now comes the other point, and this is, I think, by far the more difficult point in the case. Assuming that I am justified in finding, as I have found, that this board was put there by McLeod at the instance of Jackson, is McLeod to be regarded as the servant of the Electroflo Company or as the servant of Edward Lloyd, Ld.? As I say, he was an apprentice, and Edward Lloyd, Ld. sent him to work under Jackson, in which case he would naturally do what Jackson told him. But can I say that in those circumstances he had become the Electroflo Company's servant? It is quite true that there are authorities which say that if one man lends his servant to another, even gratuitously, then, for the purpose of responsibility arising out of the servant's acts, the person who has control of the servant at the time, that is to say, the contractor, the employer, or the master, whichever word you like to use, to whom the servant is lent, is responsible for that servant's act.

In *Bain* v. *Central Vermont Ry. Co.* (1) Lord Dunedin quotes with approval a passage from the judgment in the Canadian Court, in which it was said: "It is well established "that the master, in whose general service a man is, is not "responsible for the tortious act of the man if the control of "the master has been, for the time being, displaced by the

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(1) [1921] 2 A. C. 412, 415.

"power of control of another master into whose temporary "service the man has passed by being lent (even gratuitously) "or sub-contracted. In such a case, it is the 'patron "'momentané' and not 'the patron habituel' who is respon-"sible." He quotes in support *Donovan* v. *Laing Syndicate* (1), which is a leading case on this branch of law. Bowen L.J.'s judgment, which is cited by the Judicial Committee, contains this sentence: "We have only to consider in whose employ-"ment the man was at the time when the acts complained of "were done, in this sense, that by the employer is meant the "person who has a right at the moment to control the doing of the act." In one sense it is perfectly true to say in the present case that the person who had the control of the doing of the act at the material time was Jackson, who was in the employment of the Electroflo Company, but I think Mr. Glyn-Jones is right in saying that in all the cases that have been decided upon this point, when one examines the facts one finds that there has been a bargain or agreement, although it may be a gratuitous one, for the servant of one person to be employed by another person. In this case there is not the smallest evidence that the Electroflo Company ever asked Edward Lloyd, Ld., to provide them with a servant, except two men who were obtained from the Kent Electric Power Company, as to whom the evidence was that the men had been got by Edward Lloyd, Ld., at the request of the Electroflo Company. There, by an arrangement between the Kent Electric Power Company and the Electroflo Company, two of the Kent Company's men entered the temporary service of the Electroflo Company. But there is no evidence here that the Electroflo Company asked for the services of McLeod, either by name or by asking for the services of another man. The truth is that the officials of Edward Lloyd, Ld., thought that it would be a good thing for McLeod to go and work alongside Jackson and see how this work was being done. In other words, they were using Jackson, so to speak, as a means of carrying out their duties of instructing their apprentice McLeod. They sent McLeod to work alongside

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(1) [1893] 1 Q. B. 629, 633.

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Jackson, and of course McLeod did what Jackson told him. It seems to me to be a serious thing, in these circumstances, to say that the Electroflo Company became the employers of McLeod, because there is no evidence that Jackson had authority, on their behalf, to engage him. In the circumstances, I think that McLeod remained Edward Lloyd, Ld.'s servant, and if they chose to put him in the position in which he was put, to do work for which he was not fit, I think that is their misfortune.

In those circumstances, therefore, I think this case can be distinguished from *Donovan* v. *Laing Syndicate* (1) and *Bain* v. *Central Vermont Ry. Co.* (2) to which I have referred, and not without some hesitation I have come to the conclusion that the plaintiff establishes his case against Edward Lloyd, Ld., and I give judgment for the plaintiff for 3325*l.*

Judgment for plaintiff.

Solicitors for plaintiff: *Gardiner & Co.*
Solicitors for defendants: *L. Bingham & Co.*

(1) [1893] 1 Q. B. 629. (2) [1921] 2 A. C. 412.

J. W. H.

ATTORNEY-GENERAL *v.* LONDON CASINO, LIMITED.

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July 26, 27.

Revenue—Entertainments duty—" Payments for admission to any " entertainment " — Restaurant — Dinner and revue — Minimum Charge—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1.

The Finance (New Duties) Act, 1916, s. 1, imposed a duty on " all payments for admission to any entertainment," and (sub-s. 4) " where the payment . . . . is made by means of a lump " sum " and " the Commissioners are of opinion that the payment " . . . . represents payment for other privileges, rights or purposes " besides the admission to an entertainment, ... the duty " shall be charged on such an amount as appears to the Commis- " sioners to represent the right of admission to entertainments in " respect of which entertainments duty is payable."

The London Casino, Ld. owned and carried on a restaurant, at which a minimum charge of 15*s.* 6*d.* was made for dinner. Dinner was served on the premises, which had previously been used as a theatre, and the theatre stage was so adapted that persons paying for the dinner and occupying the tables could see an elaborate revue which was in two parts and was produced on the stage from 8.15 to 9 P.M. and from 9.15 to 10 P.M. No charge was made for the show other than the payment for the dinner, which was served either at a fixed price or à la carte, and for which a bill was rendered to the customer at the end of the meal :—

Held, that there was " an entertainment," for admission to which payment was made within the Act, and that it was for the Commissioners to allocate the exact proportion of the lump sum paid for the dinner upon which entertainments duty was chargeable.

J. Lyons & Co., Ld. v. *Fox* [1919] 1 K. B. 11 considered and distinguished.

INFORMATION by the Attorney-General on behalf of the Crown claiming that the defendants were liable for entertainment duty under the Finance (New Duties) Act, 1916. (1)

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(1) Finance (New Duties) Act, 1916 (6 Geo. 5, c. 11), enacts as follows :—

Sect. 1, sub-s. 1 : " Entertain- " ments Duty " is charged on all payments for admission to any entertainment as defined by that Act.

Sub-s. 2 lays down regulations for admission for payment to any entertainment where the payment is subject to entertainments duty and imposes penalties, if any person is admitted for payment to any place of entertainment and the provisions of the section are not complied with.

Sub-s. 4 : " Where the payment

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The defendant company was formed in 1935 to carry on the business of a theatre, cinema, concert hall, and restaurant. For this purpose premises were acquired known as the Prince Edward Theatre in Old Compton Street, Soho, London, W. The theatre was altered to suit the object of a restaurant, but the general aspect of a theatre was retained, with an enlarged stage. The stalls and dress circle were occupied by tables and seats so arranged as to afford diners an unobstructed view of the stage. The stage was then adapted for the production of high-class revues, but kitchens were established under the stage, thus eliminating certain stage effects. The revues, of which two performances were given nightly at 8.15 P.M. and 11.40 P.M. during dinner and supper, compared favourably with those produced at any London or Parisian theatre. The earlier performance was in two parts—from 8.15 to 9 P.M. and from 9.15 to 10 P.M. The later performance was in a shortened form. While the revue was not in progress guests could dance upon a floor formed by an arc which projected from the stage into the auditorium.

An agreement was entered into by the defendants with

"for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club . . . . or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, the entertainments duty shall be paid on the amount of the lump sum, but where the Commissioners are of opinion that the payment of a lump sum . . . . represents payment for other privileges, rights or purposes besides the admission to an entertainment . . . . the duty shall be charged on such an amount as appears to the Commissioners to represent the right of admission to entertainments in respect of which entertainments duty is payable."

Sub-s. 5 . . . .

Sub-s. 6: "Entertainment" is defined as including "any exhibition, performance, amusement . . . . to which persons are admitted for payment," and "admission to an entertainment" as including "admission to any place in which the entertainment is held;"

"Admission" is defined as meaning "admission as a spectator or one of an audience," and "payment on admission" as including "any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving duty or more duty is required."

"Paris in New York, Inc.," a company incorporated in New York, by which the latter company was to produce the revues at the defendants' restaurant, and was to hold a substantial interest in the defendant company, with representation on the board of directors.

The minimum charge for dinner or supper was 15*s.* 6*d.* for a table d'hôte meal on the ground floor and 12*s.* 6*d.* on the balcony, the same meals being served in all parts of the premises. On Saturdays and certain gala nights this charge was increased. Extras, such as special dishes, drinks and cigars, were also paid for. The minimum charge was paid by all persons resorting to the premises, whether they ordered or consumed any food or not. The dinner or supper consisted of five courses and was up to the standard of a first-class restaurant. No charge was made to persons on admission, but on application at a bureau in the foyer of the premises a slip was given to the customer, and on receipt of this the head waiter allotted a table to him in the auditorium. At these tables menu cards were placed before customers and they were invited to give orders for a meal. At the end of the meal payment was made in the usual way for all food consumed, and persons paying the minimum charge and upwards were able to see the revue on the stage without further charge. It was possible to engage tables beforehand through the usual theatre agents by paying a booking fee in addition to the minimum charge.

By the information the Attorney-General claimed that the revues were entertainments and that the minimum charges were payments made (inter alia) for admission to these entertainments, and that the company was liable for entertainments duty under the Finance (New Duties) Act, 1916, s. 1.

The defendants denied that the minimum charge made by them or any part thereof constituted payment for admission to an entertainment.

Sir Donald Somervell A.-G. and *Valentine Holmes* (*H. P. Milmo* with them) for the Crown. The Finance (New

Duties) Act, 1916, s. 1, creates the charge, which is to be levied on all payments for admission to any entertainment. A penalty is imposed by s. 1, sub-s. 2, if the section is not complied with, and (sub-s. 4) where a lump sum is paid for admission to an entertainment, and the Commissioners are of opinion that the lump sum represents payment for other privileges, the duty is to be charged on such amount as appears to the Commissioners to represent the right of admission to "the entertainment" only. All the conditions essential to the imposition of entertainments duty are present here. There is undoubtedly an exhibition or performance, and the only question is whether payment is made for admission. That question is one of fact and, having regard to the elaborate nature of the revue, the fixing of the minimum charge whether dinner is taken or not, and the facts generally, our submission is that payment is in part made for admission to the revue. For persons are clearly induced to come by the prospect of "seeing the show." The authorities make it plain that the statute is to be widely construed in considering the nature of the payment. It may be made in advance, or by way of subscription through a club, as in *Attorney-General* v. *Swan* (1); *Attorney-General* v. *Valentia* (2); and *Attorney-General* v. *Arts Theatre of London.* (3)

In *J. Lyons & Co.* v. *Fox* (4) the music was only incidental to the dinner, and the majority of the Court held that the duty did not attach. But that case is inconsistent with *Attorney-General* v. *McLeod* (5) and the other authorities. It is distinguishable on the facts of the present case, which is far stronger. Here it is submitted that entertainments duty is chargeable, if not upon the full minimum charge, then upon such part of it as appears to the Commissioners to be fairly attributable to the entertainment.

Norman Birkett K.C. and *Michael Rowe* for the defendants. The scheme of the Act of 1916 is that duty should be assessed on the price paid for admission to any entertainment. The minimum charge at the London Casino cannot be so described, and liability in such a case was never contemplated by the Act. The subject is here entitled to say that the duty is not plainly imposed and therefore that he should go free. Entertainment is now an integral part of the hotel business, and this was recognized in *J. Lyons & Co.* v. *Fox* (1), a decision which is on all fours with the present case. The difference is only one of degree. There is here no charge for admission to an entertainment and the performance is incidental to and subsidiary to the dinner. The majority of the Court in the *Lyons* case took that view. *Attorney-General* v. *McLeod* (2) was an entirely different case, the dinner and concert being an isolated event. Similarly in the "club cases" it was clear that the payment of the subscription entitled members to a specific benefit. Those cases are therefore inapplicable here and no case is made out for imposition of the duty. The statute does not apply and the information should be dismissed.

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(1) [1922] 1 K. B. 682.
(2) (1924) 41 Times L. R. 78.
(3) [1933] 1 K. B. 439.
(4) [1919] 1 K. B. 11.
(5) [1918] 1 K. B. 13.

[FINLAY J. to the Attorney-General. I should like to hear you upon the decision in *J. Lyons & Co.* v. *Fox.* (1)]

Sir Donald Somervell A.-G. in reply. In that case the music was a minor affair and merely incidental to the dinner. The question is one of fact whether people come for the entertainment or not. Here they obviously do. Furthermore, it is difficult to reconcile the judgments in *J. Lyons & Co.* v. *Fox* (1) with *Attorney-General* v. *McLeod.* (2) The dicta of Bailhache and A. T. Lawrence JJ. as to the meaning of "payment for "admission," in their judgments in the *Lyons* case, have not been approved or followed in later decisions. In *Attorney-General* v. *Swan* (3) Roche J., as he then was, referring to the *Lyons* case, said that the difference of opinion there arose from a difference between the members of the Court in the interpretation of the magistrates' findings of fact, and he adds: "there "is nothing to prevent the question in this case from being "a pure question of fact, and it is just because, in these cases, "the question is one of fact that one meets with such "difficulties."

(1) [1919] 1 K. B. 11.
(2) [1918] 1 K. B. 13.
(3) [1922] 1 K. B. 682.

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FINLAY J. [after referring to the facts stated above and reading the Finance (New Duties) Act, 1916, s. 1, continued :] I have no doubt that there was here an exhibition or performance, and that, if payment was made for admission to this revue in a theatre, then entertainment duty would be exigible. The question is whether it is so exigible in the circumstances of this case.

There have been various decisions upon this Act. The first of the line of cases is *Attorney-General* v. *McLeod* (1), which concerned the Freemasons' festival at which there was a dinner, and a concert after the dinner in another room, which persons dining might attend. Lord Roche (then Roche J.) held that while duty was not exigible in respect of the dinner for which an inclusive sum was paid, this sum was properly apportioned by the Commissioners, a portion being referable to the concert, which was an " entertainment." That was followed by *J. Lyons & Co.* v. *Fox* (2), in which the facts were very different. In that case, which arose during the war, the proprietors of the Trocadero Restaurant provided concerts to which persons taking tea and dinner could listen during and after the meal. No charge was made except for the meals, for which a bill was rendered to customers. The majority of the Court (Darling, A. T. Lawrence and Bailhache JJ.) held that the payments made by customers were not payments for admission to an entertainment within s. 1, sub-s. 1, of the Act and that the duty was not exigible, but Shearman and Salter JJ. dissented. There are observations in the judgments of the majority which have given me considerable difficulty and I shall refer to them later. That was followed by *Attorney-General* v. *Swan* (3), which related to the Essex County Cricket Club. There it was held that part of the members' subscription was referable to the right which it gave them to see all matches played on the ground, and therefore that entertainments duty was payable. A case in 1920, *Cordiner* v. *Stockham* (4), related to a concert on the Palace Pier at Brighton, in which it was held that where a man went into a hall with glass sides, sat down and listened to a concert, paying 2*d.* for his chair, entertainments tax was payable, on the ground that the concert was an entertainment and that the 2*d.* constituted payment for admission thereto.

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(1) [1918] 1 K. B. 13.
(2) [1919] 1 K. B. 11.
(3) [1922] 1 K. B. 682.
(4) [1920] 1 K. B. 104.

In 1924 there was an important case relating to the Hurlingham Club, in which it was held that persons paying subscriptions to the club must be deemed to pay part of those subscriptions for the right of entrance to polo or tennis matches: *Attorney-General* v. *Valentia.* (1) That case illustrates the point, as the Attorney-General said, that a liberal construction has been given by the Courts to the words "payment for admission," because nobody using ordinary language would say that a member of the club paying his subscription was paying for admission to an entertainment, and yet that is what the Court of Appeal there held. In *Attorney-General* v. *Arts Theatre of London* (2) members of the club paid a subscription and had a right in respect thereof to secure upon further payment admission to theatrical performances given on the club premises. The Court of Appeal held that the subscription must be broken up, as in the Hurlingham case, and that duty was exigible in respect of that part of it which represented the right of entry to an entertainment —namely, the theatrical performances given at the club. Upon these authorities I think it is quite clear that there was here an entertainment and that when 15*s.* 6*d.* was paid for the dinner it was paid also for admission to an entertainment. I should have thought that the matter was plainly one for a splitting up of this lump sum by the Commissioners as indicated in s. 1, sub-s. 4, but a difficulty is caused by the observations of the majority of the learned judges in *J. Lyons & Co.* v. *Fox.* (3) I have already said that the facts there were very different, and the learned judges could not have contemplated a case such as arises here. Nevertheless there are passages, particularly in the judgments of Bailhache and A. T. Lawrence JJ., which have caused me some difficulty. Bailhache J. said: "Is there anything in this Act which compels

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(1) 41 Times L. R. 78.
(2) [1933] 1 K. B. 439.
(3) [1919] 1 K. B. 11, 21, 22.

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"the Court to give to the words 'payment for admission' a "meaning of a special character, and not the meaning which "any person of ordinary intelligence would give to the words? "I think not." If the learned judge there meant that the words "payment for admission" had reference to what we may conveniently call the "turnstile" theory, I think that later authorities clearly show that he was wrong. He goes on: "On the contrary, every line of the Act convinces me that "the language used in the Act is used in the ordinary sense "in which an ordinary person would use it, and it is therefore "quite unnecessary to pray in aid the rule of construction "that where the meaning of a taxing Act is doubtful the "language must be given that construction which is most "favourable to the tax-payer. To my mind there is nothing "doubtful about the meaning of the words 'payment for "'admission' to an entertainment. It is true in a sense that "payment of the bill for a dinner at the Trocadero includes "payment for the musical entertainment which is given "during and after dinner, but it is impossible in my opinion "to hold that the sum paid for the dinner is a payment for "admission to an entertainment within the meaning of this "Act." To the same effect A. T. Lawrence J. said: "The "question is, what does the Act mean? If the Act was "intended to hit cases of this kind, and if the language used "clearly carries out that intention, then, of course, the Act "must be applied although there may be difficulties in doing "so; but I do not think that the Act was intended to apply "to this class of case. I think it was aimed at cases where "people pay for admission to an entertainment in the ordinary "way." I need scarcely say with what respect one treats any observations made by A. T. Lawrence J., but I make the same remark both as to him and Bailhache J. that if he in that passage was thinking that the "turnstile" theory could be applied, later authorities show that he was wrong. I have come to the conclusion with some difficulty that inasmuch as *J. Lyons & Co.* v. *Fox* (1) can be supported on the facts of the case and the concert was merely incidental to the dinner, these passages are not sufficiently strong to induce me to hold that the Attorney-General must fail on the ground that this case is covered by that decision. As I have said, the facts are different, and these dicta must be read with reference to the facts then before the Court. If they are read in a wider sense they are inconsistent with subsequent decisions, which include one in the Court of Appeal. I am confirmed in that view by the valuable observations of Roche J. (as he then was) in *Attorney-General* v. *Swan* (1) as to the effect of *J. Lyons & Co.* v. *Fox.* (2) He said: " In other words, there is nothing to " prevent the question in this case from being a pure question " of fact, and it is just because, in these cases, the question is " one of fact that one meets with such difficulties as arose in " *Cordiner* v. *Stockham* (3) and still more in *Lyons & Co.* v. " *Fox.* (2) The difference of opinion in the latter case arose, " as I read it, from a difference between the members of the " Court in the interpretation of the findings of fact by the " magistrate." Those observations confirm me in the view which I have formed as to the manner in which the dicta of the judges in *J. Lyons & Co.* v. *Fox* (2) to which I have referred ought to be treated. I think therefore that the payment here is payment for admission to an entertainment, but not, of course, the whole of that payment. The words in the latter part of s. 1, sub-s. 4, as Lord Hanworth M.R. pointed out in *Attorney-General* v. *Arts Theatre of London* (4), are general and ought to be applied here. It is clearly for the Commissioners and not for the Court to decide what is the proper allocation of the lump sum and what duty is exigible. It is right for me to add that these cases are largely questions of fact, and the present decision has no application other than to the immediate matter before me.

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(1) [1919] 1 K. B. 11.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Customs and Excise.*

Solicitors for defendants: *Kenneth Brown, Baker, Baker.*

(1) [1922] 1 K. B. 682, 687.
(2) [1919] 1 K. B. 11.
(3) [1920] 1 K. B. 104.
(4) [1933] 1 K. B. 439, 465.

F. P. F.

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Oct. 14.

SMITH *v.* CORPORATION OF BIRKENHEAD.

Local Government—Private street works—Provisional apportionment of expenses between frontagers—" Measurements of the frontages and " the other considerations (if any) on which the apportionment is " based "—Insufficient information—Amount of particularity required—Birkenhead Improvement Act, 1884 (47 *&* 48 *Vict. c. lvi*), *ss.* 21, 25, *Second Schedule, Part I.*

The Birkenhead Improvement Act, 1884, by s. 25 provides that: " In a provisional apportionment of expenses of private " street works the apportionment of expenses against the premises " fronting adjoining or abutting on the street or part in respect " of which the expenses are to be incurred shall be apportioned " according to the frontage of the respective premises : Provided " that the surveyor may settle the apportionment as having regard " to all the circumstances of the case and not merely to frontage " he may deem most just."

By Part I. of the Second Schedule to the Act (which is identical with the Schedule to the Private Street Works Act, 1892), it is provided that provisional apportionments " shall state the " amounts charged on the respective premises and the names " of the respective owners or reputed owners and shall also " state whether the apportionment is made according to the " frontage of the respective premises or not and the measurements of the frontages, and the other considerations (if any) " on which the apportionment is based."

The Birkenhead Corporation, having resolved to execute certain private street works, approved a " provisional apportionment " of the expenses of the said works between the respective frontagers. The document was expressed to be made " pursuant to the " provisions of the Birkenhead Improvement Act, 1884, and " principally according to the frontage of the respective premises, " and having regard to all the circumstances of the case and the " amount and value of the work already executed by or on behalf " of certain frontagers."

The provisional apportionment was subdivided into different columns showing the names of the respective owners, particulars of the respective properties charged, and the measurements of the frontages respectively, and also showing the estimated cost, attributable to each owner, of the work to be executed, under a number of headings. The basis of division was different in different columns, and in some columns the frontagers had been charged on different footings, but the apportionment contained no statement or explanation as to how the various factors, stated in the heading of the apportionment as the considerations on which the apportionment was based, had been applied in the division of the estimated cost of the work between the various owners.

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On appeal by one of the frontagers from a decision of the justices, overruling a preliminary objection that the provisional apportionment did not comply, for lack of particularity, with the requirements of the local Act:—

Held, that the Act required particularity, for the information both of the respective frontagers and of the corporation, and, if no uniform scale was applied, it ought clearly to be shown where the deviation took place; that the provisional apportionment failed to give the complete and specific disclosure required by the Schedule and the appeal must be allowed and the case sent back to the justices.

APPEAL (by way of Case stated by Justices of the Peace for the County Borough of Birkenhead), brought by Mrs. Marion Scott Smith, of The Homestead, Moreton Road, Upton, Cheshire, against a decision of the said justices, dismissing a preliminary objection made on her behalf to a provisional apportionment of expenses approved by the Corporation of Birkenhead in respect of certain private street works within their area.

The case, after reciting that at a meeting on October 7, 1936, the corporation approved plans, specifications, estimate, and provisional apportionment of expenses between frontagers, submitted by the borough surveyor, for making and completing a certain road within the borough of Birkenhead called Upland Road, from Moreton Road to the north-easterly boundary of No. 49 Upland Road, contained the following material statements:—

The total frontage on the said Upland Road is 2618 feet 7 inches, the total number of premises concerned is 49, and the total estimated cost is 2523*l.* 1*s.* 11*d.*

The appellant is the owner of one of the said premises concerned, a dwelling-house known as The Homestead, which faces and opens on to Moreton Road with a frontage thereto of 110 feet or thereabouts, and abuts on Upland Road and has a frontage thereto of 421 feet 2 inches, having access to Upland Road only by a gate 3 feet 6 inches wide.

Out of the aforesaid total estimated cost of 2523*l.* 1*s.* 11*d.* the appellant is shown in the provisional apportionment to be charged with a sum of 430*l.* 3*s.* 6*d.*, which is in excess of the amount which would be apportioned to her if calculated by dividing the total estimated cost in the same proportion as the appellant's frontage bears to the total frontage of the said road.

The provisional apportionment is expressed to be made "pursuant to the provisions of the Birkenhead Improvement "Act, 1884, and principally according to the frontage of the "respective premises, and having regard to all the circumstances of the case and the amount and value of work already "executed by or on behalf of certain frontagers."

The said provisional apportionment is sub-divided into different columns showing the names of the respective owners and particulars of the respective properties charged and the measurements of the frontages respectively, and also showing the estimated cost, attributable to each owner, of the work to be executed, under the following headings, "Drainage," "Road-making," "Channels," "Private Crossings," "Kerbs," "Flagging and Verges," together with additional columns showing the total amount chargeable to each owner. The basis of division is different in different columns, and in some columns the appellant has been charged on a footing different from other owners in the same columns, but the apportionment contains no statement or explanation as to how the various factors (stated in the heading of the apportionment as the considerations on which the apportionment is based) have been applied in the division of the estimated cost of the work between the various owners.

The respondents' surveyor has settled the said provisional apportionment, having regard to all the circumstances of the case and not merely to frontage, as he deemed most just, and detailed information as to how the respective amounts charged against individual frontagers were made up is available on application to him.

It is impossible for the appellant or any individual frontager to ascertain, otherwise than generally, with regard to his or her respective premises, from the provisional apportionment or from any of the documents deposited in pursuance of the Improvement Act, either how the consideration or considerations on which the apportionment against the appellant or such individual frontager, with regard to his or her respective premises, is applied, or to ascertain how the amount charged against the appellant or such individual frontager on his or her respective premises is arrived at, or to check the correctness of such amount.

On behalf of the appellant it was contended that the requirements of the Improvement Act and the Second Schedule thereto had not been complied with.

The justices held that the provisional apportionment sufficiently complied with the requirements of the Improvement Act and the Second Schedule thereto, having regard to the difficulties in showing all the details of any such proposed works in a document such as the provisional apportionment. They therefore overruled the appellant's preliminary objection.

Allister Hamilton for the appellant. The Second Schedule of the local Act, which is identical with the provision in the Schedule to the Private Street Works Act, 1892, requires that certain particulars as to the considerations on which a provisional apportionment is based shall be stated. There is nothing in the provisional apportionment in this case to indicate which are the premises to which the frontage basis has been applied or to which of the columns the frontage basis has been applied. There is nothing to indicate what are the other considerations to which regard has been had, or who are the "certain frontagers" to whom work already executed has been credited, or the value attached to such work. The object of the Schedule is to protect the frontager against whom a charge is to be levied and enable him to test the correctness of such charge, and, if he so desire, to object thereto.

Ralph Etherton for the respondents. The provisional apportionment complies with each and every technical requirement of the Act, and there is nothing in the Act which requires mathematical calculations to be deposited, although they are in fact available. The Schedule provides that the provisional apportionment shall state first the amounts charged on the respective premises. That is done. Also, whether the apportionment is made according to the frontage of the respective premises or not, and the other considerations (if any) on which the apportionment is based. That is done by the words in the heading "and principally according to "the frontage of the respective premises, and having regard "to all the circumstances of the case," etc. Instead of saying aye or no whether they have merely followed the frontage basis the respondents have set out the further matters to which consideration has been had. In so doing they are merely following the words of the Act. There is nothing in it which requires them to set out in detail how the calculations are arrived at. That would be impossible in a document of this kind.

LORD HEWART C.J. This is a case stated by justices for the county borough of Birkenhead. The difficulty arose in the following way. Objections by the present appellant were made to the proposals of the corporation of Birkenhead under the Birkenhead Improvement Act, 1884, with regard to certain private street works in Upland Road, Birkenhead. Those objections were being heard by the justices on January 27 last. Thereupon the appellant took the preliminary objection that the requirements of the Local Act had not been fulfilled with regard to the provisional apportionment of expenses. The gist of the matter is contained in the contention of the appellant, which is summarized as a statement of fact by the justices in paragraphs 16, 17, and 18, of the case. I read the words of those paragraphs which precede the appellant's contentions. The case said that "The basis of division is "different in different columns"; that is to say, in the provisional apportionment, and that "in some columns the "appellant has been charged on a footing different from other "owners in the same columns, but the apportionment contains "no statement or explanation as to how the various factors "(stated in the heading of the apportionment as the con-"siderations on which the apportionment is based) have been "applied in the division of the estimated cost of the work "between various owners." The case goes on to state as a fact that "It is impossible for the appellant or for any "individual frontager to ascertain, otherwise than generally, "with regard to his or her respective premises, from the "provisional apportionment or from any of the documents "deposited in pursuance of the Improvement Act, either how "the consideration or considerations on which the apportionment against the appellant or such individual frontager, with "regard to his or her respective premises, was applied, or to "ascertain how the amount charged against the appellant or "such individual frontager on his or her respective premises "is arrived at, or to check the correctness of such amount."

In that state of facts the appellant contended, among other things, that the requirements of the Improvement Act, and the Second Schedule to it, had not been complied with, and that the particulars which were furnished were vague, ambiguous, and embarrassing, and did not constitute a compliance with the requirement of the Act. The contrary was contended on the part of the respondents, and in the result the justices came to the conclusion: " That the provisional apportionment "sufficiently complied with the requirements of the Improvement Act and the Second Schedule thereto, having regard "to the difficulties in showing all the details of any such "proposed works in a document such as the provisional "apportionment, and we over-ruled the appellant's objection "and adjourned the further hearing of the said objections to "the said proposals." The question for this Court is whether, in so deciding, the justices came to a correct determination in point of law.

The matter is really quite simple. Sect. 21, sub-s. 1, of the Birkenhead Improvement Act, 1884, provides that " Where "any street (not being a highway repairable by the inhabitants "at large or a street belonging to or repairable by a railway "company) or the carriage way or footway or any other part "of such street is not sewered levelled paved metalled "macadamized flagged kerbed channelled or made good or is "not lighted to the satisfaction of the corporation the "corporation may from time to time resolve with respect to

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"such street or part to do any one or more" of certain works. It is provided that the expenses incurred by the corporation in executing the private street works shall be apportioned among the premises fronting, adjoining or abutting on such street or part. The section goes on to provide that the surveyor is to prepare specifications, estimates, provisional apportionments, with plans, and by sub-s. 3 it is provided, among other things, that " Such . . . . provisional apportion-"ments shall comprise the particulars prescribed in the first "part of the Second Schedule to this Act and shall be submitted "to the corporation who may by resolution approve the same "respectively with or without modification or addition as they "think fit." It is further provided that the resolution approving the specifications, etc., shall be published in a certain manner and that the document shall be kept deposited at the municipal offices and be open to inspection. Then follow provisions with regard to objections to the proposed work. The owner of the premises may make an objection on various grounds, one of which is that the provisional apportionment is incorrect in respect of some matter of fact which is specified in the objection, or in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of the premises. There is a proviso that any owner of any premises shown in a provisional apportionment as liable to be charged may object on the ground that any premises ought to be excluded, or on the ground that the provisional apportionment is incorrect in respect of some matter.

What is it that by the provisions of this Act the provisional apportionment must state ? That question was answered by the fourth paragraph of Part I. of the Second Schedule to the Act, under the heading " Provisional Apportionments." It provides : " These shall state the amounts charged on the "respective premises and the names of the respective owners "or reputed owners "—there is no question about that in the present case—" and shall also state whether the apportionment "is made according to the frontage of the respective premises "or not and the measurements of the frontages and the other "considerations (if any) on which the apportionment is based." The reason why those words are present in the Schedule is to be found in the provisions of s. 25 of the Act, which contains the following proviso: "That the surveyor may settle the "apportionment as having regard to all the circumstances of "the case and not merely to frontage he may deem most just." It will be observed, therefore, that one of the things which the provisional apportionment is required to do is to state the other considerations, if any, on which the apportionment is based.

Those being the requirements of the statute, the provisional apportionment in this case in its original form consisted in the body of it of a series of columns giving the names of owners, description of premises, frontage, the nature of the works under various headings, and the total cost, and had for its heading these words: "A provisional apportionment on the various "premises of the estimated expenses . . . . pursuant to the "provisions of the Birkenhead Improvement Act, 1884." There it stopped. Objection was taken before the matter came before the justices that that was not an adequate description of the way in which the apportionment had been made, and accordingly there was an amendment. When the amendment was made the heading read in this way: "Pursuant "to the provisions of the Birkenhead Improvement Act, 1884, "and principally according to the frontage of the premises "and having regard to all the circumstances of the case and "the amount and value of the work already executed by or "on behalf of certain frontagers." It is apparent, therefore, that the provisional apportionment does not say that the apportionment is made according to the frontage of the premises. That question is answered in the negative. Does it go on to say what are the other considerations on which the apportionment is based? I think, clearly, that the answer to that question is "no." It says that other considerations have been taken into account, but it does not say what they are, nor how, nor to what extent they have been taken into account. All it says is: "Principally "according to the frontage of the respective premises and "having regard to all the circumstances of the case and the "amount and value of the work already executed by or on "behalf of certain frontagers."

It is contended on behalf of the appellant that that statement does not comply with the requirements of the Schedule. Mr. Etherton, if I follow his argument, argues, in the first place, that this word " and " after " circumstances "of the case " is really an epexegetical " and " ; it is not adding anything, but is merely explaining what are the circumstances of the case. That is not the natural construction of this document. As it stands there must be an enumeration of three things as the basis of the computation : (1.) " Principally "according to the frontage " ; (2.) " Having regard to all "the circumstances of the case " ; and (3.) " And the amount "and value of the work already executed by or on behalf of "certain frontagers." Even if it were the fact, as I do not think it is, that the circumstances of the case referred to are known, other than the words afterwards mentioned—namely, "the amount and value of the work already executed," I cannot think that this document fulfils the requirements of the Act. As it is, the reader, the owner of the premises, is left wondering " to what extent is the frontage treated as "the basis, to what extent are other circumstances, and what "circumstances, brought into the calculation, and if I am "being credited with the value of the work already executed "by me or on my behalf, what is the sum with which I am "credited ? " Then one looks below the headings at the figures, and no light is thrown at all on any of those questions. What is easily apparent, if one compares a few sets of premises, is that various methods have been followed. It is impossible to find here a uniform scale. It might conceivably be the case, for example, that an owner had had work executed for him which cost 75*l.* The surveyor in making this estimate might have given him credit for 15*l.*, 20*l.*, 25*l.*, 30*l.*, 40*l.* or 50*l.* There is nothing here to show to what extent credit has been given.

I think the purpose of this Act is reasonably plain. Particularity is required for the information, on the one hand, of the respective owners, and not least for the members of the corporation, who have to bring their minds to the question whether they are prepared to approve the resolution that confirms the document. If they are to bring an intelligent mind to bear on that question, they must know on what principle the figures have been arrived at. It seems to me that where a surveyor, no doubt for good and sufficient reasons, has chosen to depart from the simple computation according to the frontage of the premises, he ought to state in clear language what, and how far, and by what method, other matters have been taken into consideration. To apply that canon to the present case, the surveyor, it seems to me, ought to state quite clearly, and it could be done in a few words, what are the circumstances of the case to which he has had regard, and, where he has had regard to the amount and value of the work already executed by the frontager, what, in each case, is the amount which he has put to the frontager's credit. There ought, one would think, to be one weight and one measure for all; but if, indeed, there are different measures, if no uniform scale is applied, it ought clearly to be shown how and where the deviation takes place. I should have thought that it would have been quite simple for the surveyor, in a brief document, not to suggest but to show what are the various circumstances to which he has had regard—and that will indeed be a simple task if Mr. Etherton is right in contending that the words " and the "amount and value of the work already executed " are merely explanatory of that expression—and then to add a schedule where he shows, in respect of each respective owner, what is the amount and value of the work already executed by him or on his behalf which has been brought into the calculation. Some method there must be. A surveyor cannot be heard to say, nor would he dream of saying, that all this is haphazard. There must be some method, some principle, some ratio, and if so it is capable of brief and clear expression. I think this Schedule requires that, for the benefit of the respective owners, as indeed also for the benefit of the corporation and those whom the corporation represent, there

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should be a complete and specific disclosure. As it is, the whole matter is left vague, and the individual owner is left speculating in his own case not only what has been taken into account but also by what method the calculation has been made, and, where he is credited with having spent money, what is the amount with which he is so credited.

In my opinion the contention of the appellant was right and this provisional apportionment does not exhibit the particularity for which the statute provides. Particulars are particulars, not generalities. These are generalities in this document. I think, therefore, that the appeal ought to succeed and that the case ought to go back to the justices.

I do not think it is desirable that we should prescribe to the justices the course which they should then observe, but it is to be noticed that by s. 23 of the Act it is provided that "The Court"—that is to say, the justices—"may quash in "whole or in part or may amend the resolution plans sections "estimates and provisional apportionments or any of them "on the application either of any objector or of the corporation. "The Court may also if it thinks fit adjourn the hearing and "direct any further notices to be given." Though not laying down any course to be followed, and merely indicating a course which might be taken, I should have thought that the simple course for the justices would be to adjourn the hearing and direct that further notices be given of a provisional apportionment amended in the sense which has been indicated. This appeal ought to be allowed, with costs.

DU PARCQ J. I agree not only in the result but also with all the reasons which have been suggested by my Lord. I only wish to add this: The justices state their opinion in this way: "We were of the opinion that the provisional "apportionment sufficiently complied with the requirements "of the Improvement Act and the Second Schedule thereto, "having regard to the difficulties in showing all the details of "any such proposed works in a document such as the provisional "apportionment." With great respect to the justices there seem to me to be two errors in that. First, they seem to have thought that it would in some way impair the symmetry or destroy the proper form of a document like a provisional apportionment if it contained any more information. There is no sanctity, so far as I know, about the form of a provisional apportionment. What is quite clear is that it must under this Act contain certain statements and particulars which this provisional apportionment did not contain. The second error is that the mere fact that it may cause a little more difficulty, and may be a little more trouble to comply with the requirements of the Act, is not a ground for saying that something is a compliance with the Act which does not comply with it in fact. I agree with the judgment of my Lord.

ATKINSON J. It seems to me that the wording of the Second Schedule, in so far as it is relevant to this case, is clear beyond question. The provisional apportionment must specify each and every consideration which has entered into the apportionment, and if a consideration affects only certain of the columns, certain of the expenditure, it must be stated which they are. One consideration in this case is the value of the work already executed. A general statement of that kind is of no use to anybody, and it is almost certainly incorrect, because it is difficult to think of a particular expenditure by a frontager on particular work which can affect the whole apportionment. I think that the Schedule ought to state which figures have been affected by the cost or value of the work already done, and to what extent. I agree with what my brethren have said, and that the appeal should be allowed, with costs.

Solicitors for the appellant: *Bartley, Cocks & Bird.*

Solicitors for the respondents: *F. Venn & Co., for E. W. Tame, Town Clerk, Birkenhead.*

A. W. G.

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Oct. 13.

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Road traffic—Motor car—Exceeding speed limit—Ford Utility car—Car constructed to carry passengers and goods—Passenger vehicle—Goods vehicle—"Constructed solely"—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 10*—Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *Sch.* I.

A motor car, in order to be a passenger vehicle which, within the meaning of Sch. I. to the Road Traffic Act, 1934, is entitled to exceed the normal speed limit of 30 miles per hour, must be a vehicle "constructed solely" for the carriage of passengers and their effects :—

Held, therefore, that a Ford Utility car, constructed to carry passengers and also to carry goods other than passengers' effects, was not a passenger vehicle but a goods vehicle, subject to the normal speed limit of 30 miles per hour.

CASE stated by Essex justices.

At a court of summary jurisdiction sitting at Colchester on January 9, 1937, an information was preferred by the appellant, Walter Harry Hubbard, against the respondent, Leslie John Messenger, for that the respondent, on November 23, 1936, in the parish of Easthorpe, in the county of Essex, unlawfully did drive a certain Ford Utility van fitted with pneumatic tyres and constructed or adapted for the conveyance of goods or burden on a certain public highway there situate at a speed greater than 30 miles per hour (which speed is specified in Sch. I. to the Road Traffic Act, 1934 (1),

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(1) Road Traffic Act, 1934 (24 & 25 Geo. 5, c. 50), Sch. I.

LIMITS OF SPEED—CLASS OF VEHICLE.	Maximum speed. Miles per hour.
1. Passenger vehicles, that is to say, vehicles constructed solely for the carriage of passengers and their effects :—	
(1) If the vehicle is a heavy motor car or is adapted to carry more than seven passengers, exclusive of the driver, and is not drawing a trailer, and if the first condition as to tyres is satisfied	30
(2) If the vehicle is adapted to carry not more than seven passengers exclusive of the driver, and is not a heavy motor car, and is drawing a two-wheeled trailer, and if the first condition as to tyres is satisfied	30
(3) Invalid carriages	20
(4) In any other case (except a vehicle as respects which the first condition as to tyres is satisfied,	

as the maximum speed in relation to such vehicle) contrary to s. 2 of the Act.

The following facts were proved or admitted:

The vehicle in question was the property of Viscountess Byng of Vimy, and the respondent was the chauffeur, and it was registered and licensed as a private vehicle. The vehicle was a Ford V.8 Utility car, and was constructed as follows:—

The engine and chassis were similar to those used in the manufacture of Ford V.8 passenger saloon motor cars, and were dissimilar to those used in the manufacture of Ford vans and lorries. Instead of a saloon body the vehicle was fitted with a body constructed of wood having a roof over it and with curtains of celluloid fitted at the sides and rear of the car. The windscreen and windows in the doors were made of safety glass. In the forward portion of the body was a seat large enough to accommodate the driver and two other persons; behind this were two other single seats, and behind these a rear seat large enough to accommodate three persons. The construction of this rear seat was such that the whole of the seat could easily be lifted out of the vehicle so as to leave a large vacant area on the floor. This vacant area could be used for the carriage of luggage or other goods or burden. No form of unscrewing or winding was necessary to remove the seat. At the back of the vehicle was a tail-board supported by drop chains and capable of being lowered to the same level as the floor of the body in order to facilitate loading or unloading.

All the seats were sprung and upholstered as in Ford V.8 passenger saloon motor cars, and the vehicle was fitted with a clock, ash-trays, and other equipment of a kind similar to the equipment of the same passenger cars, and dissimilar to that used in Ford vans and lorries. The vehicle was included by the makers in their catalogues and price lists under the

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and which is adapted to carry not more than seven passengers exclusive of the driver, and which is not drawing a trailer) 20

2. Goods vehicles, that is to say, vehicles constructed or adapted for use for the conveyance or goods of burden of any description.

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heading "passenger cars," and was so exhibited at motor shows, and was sold for 245*l.*, a sum considerably greater than that charged for a van or lorry of similar size and power.

At the time the vehicle was being driven at Easthorpe at a speed exceeding 30 miles per hour, the rear seat had been removed and the sides of the body rearward of the two single seats had been boarded up to the roof with three-ply wood. On the floor behind the two seats were two hampers of flowers, a large bunch of flowers, a flower pot, a crate of trussed chickens, a box of eggs and a suit case. A cloth curtain had been drawn across the back of the car above the tail-board. One passenger was being carried.

In an illustrated brochure relating to this car issued by the manufacturers, which was attached to the case, it was said: "The ease with which this car can be converted to meet many "different requirements . . . . makes it invaluable not only "for shooting parties, but for a score of other duties on the "country estate. It is many vehicles in one . . . . It can be "used for station work and all the other utility transport "needs of a country house."

It was contended for the respondent that the onus was on the appellant to prove that the vehicle was a goods vehicle, namely, a vehicle constructed or adapted for use for the conveyance of goods, and that there was no evidence to support this.

The appellant contended that he had proved that the vehicle was not constructed "solely" for the carriage of passengers and their effects within the meaning of the definition of "passenger vehicles" in Sch. I. to the Road Traffic Act, 1934 (1), and that consequently it was a goods vehicle within that schedule.

The justices held that the appellant had failed to prove that the vehicle was a goods vehicle within the meaning of the schedule; that the act of lifting out the rear seat was not adapting the vehicle for use for the conveyance of goods, and that the appellant had failed to prove that it was boarded up to facilitate such conveyance, and that it was

(1) See note (1), ante p. 300.

constructed solely for the carriage of passengers and their effects, such, for instance, as a shooting party; and they dismissed the information, but stated this case.

George Pollock for the appellant. The justices were wrong in holding that the onus lay on the appellant to show that this vehicle was adapted for use as a goods vehicle. By s. 10, sub-s. 1 (1), and Sch. I. to the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), the maximum speed of motor cars was fixed at 30 miles per hour except in the case of passenger vehicles (as therein defined) the wheels of which were fitted with pneumatic tyres and which were adapted to carry not more than seven passengers, in which case no speed limit was fixed. By s. 2, sub-s. 1, of the Road Traffic Act, 1934 (24 & 25 Geo. 5, c. 50), Sch. I. to the later Act is substituted for Sch. I. to the earlier Act. In the substituted schedule passenger vehicles, as therein defined, namely, " Vehicles constructed solely for the carriage "of passengers and their effects," are not subjected to the speed limits thereby imposed, if they are fitted with pneumatic tyres and are adapted to carry not more than seven passengers —see cl. 1, sub-cl. 4; consequently such cars remain as before and not subject to a limit. Therefore the general law is that no motor cars must exceed a maximum speed of 30 miles per hour except cars of the excepted class. That being the law, the onus was on the respondent to show that he came within the exception.

This vehicle was not a " passenger vehicle " within the definition in Sch. I., cl. 1, to the Act of 1934. It was originally constructed for the conveyance of goods and also for the conveyance of passengers, and therefore not constructed " solely " for the carriage of passengers and their effects. It could not be constructed " solely," if the description of its makers is correct—namely, " It is many vehicles in one." Even if this car could be said to be outside the schedule,

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(1) Road Traffic Act, 1930, s. 10 "(1.) It shall not be lawful for any "person to drive a motor vehicle "of any class or description on a "road at a speed greater than the "speed specified in the First "Schedule to this Act as the maxi- "mum speed in relation to a "vehicle of that class or descrip- "tion . . . . ."

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it would still be subject to the 30 miles limit, because all cars are so subject except where exempted; see s. 10 of the Act of 1930. (1)

Beyfus K.C. and *H. J. Baxter* for the respondent. The charge in this case was one of driving a goods vehicle at more than 30 miles per hour. It was for the prosecution to prove this, not for the respondent to prove that the vehicle was a passenger vehicle. The justices found that the charge was not proved, but proceeded further to find that the car was a passenger vehicle.

Formerly the great defect of passenger vehicles was lack of space for luggage; consequently this type was evolved as a passenger vehicle designed to carry a greater quantity of passengers' effects. If constructed for a certain purpose, the fact that a car is capable of being used in another way does not deprive it of its proposed character: *Cook* v. *Hobbs* (2); *Hanworth* v. *Williams*. (3) Ordinary cars used by commercial travellers for carrying dresses are not goods vehicles, because they were not originally constructed for that purpose. This is so even when a car is used solely for the carriage of goods, if it was originally constructed for the carriage of passengers: *French* v. *Champkin*. (4)

This was a question of fact for the justices, and though there was evidence upon which they could have found differently, they have not done so. It was suggested that the car had been adapted for the carriage of goods firstly by reason of the removability of the seats and secondly by the use of the ply-wood. The first is a feature of all cars; the second was, no doubt, evidence; but the justices did not act on it. "Effects" is not confined to such things as suit cases, etc. For instance, a child's fairy cycle would be "effects." Although there may have been evidence, the justices were not bound as a matter of law to convict.

Pollock replied.

LORD HEWART C.J. In this case Mr. Beyfus, as is to be expected,

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(1) See note (1), ante p. 303.

(2) [1911] 1 K. B. 14.

(3) (1903) 67 J. P. 315.

(4) [1920] 1 K. B. 76.

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has made an ingenious argument, but nevertheless I am quite satisfied that the appeal ought to be allowed. The case arose in the following way. An information was preferred by the appellant against the respondent charging him with unlawfully driving a certain Ford Utility van fitted with pneumatic tyres and constructed or adapted for the conveyance of goods or burden on a certain public highway at a speed greater than 30 miles an hour, contrary to s. 2 of the Road Traffic Act, 1934. The justices dismissed the information, and the question raised by this case is whether, in coming to that conclusion, they erred in point of law. In my opinion they erred in point of law in two ways. First of all, it seems to me to be plain that they misconstrued the first schedule to the Road Traffic Act, 1934, and secondly, there was really no evidence before them, except for the purpose of a paradox or a jest, which would permit them to arrive at the conclusion which they have very clearly expressed.

The facts as found were that the engine and chassis of the vehicle referred to were similar to those used in passenger saloon motor cars, and they were not similar to those used in Ford vans and lorries. But as to the body the case says: "Instead of a saloon body the vehicle was fitted with a body "constructed of wood having a roof over it and with "curtains of celluloid fitted at the sides and rear of the "car . . . ." The body was provided with seats as follows: "In the forward portion of the body was a seat large enough "to accommodate the driver and two other persons; behind "this were two other single seats, and behind those a rear "seat large enough to accommodate three persons. The "construction of this rear seat was such that the whole of the "seat could easily be lifted out of the said vehicle so as to "leave a large vacant area on the floor of the vehicle. This "vacant area could be used for the carriage of luggage or "other goods or burden. No form of unscrewing or winding "is necessary to remove the seat. At the back of the vehicle "was a tail-board supported by drop chains and capable of "being lowered to the same level as the floor of the body in "order to facilitate loading or unloading."

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On the day on which the offence was said to have been committed the rear seat in fact had been removed and the sides of the body rearward of the two single seats had been boarded up to the roof with three-ply wood, in other words, had been boarded up so as to make that part of the structure resemble a van; and on the floor behind the two single seats were two hampers of flowers, a large bunch of flowers, a flower-pot, a crate of trussed chickens, a box of eggs and a suit case. There was one passenger.

Now what is the law relating to this alleged offence? By Sch. I. to the Road Traffic Act, 1934, which is dealing with limits of speed, all vehicles are divided into three classes. There is, first of all, the class of passenger vehicles. There is secondly the class of goods vehicles. There is thirdly the class of locomotives and motor tractors. Nobody I imagine even for the sake of argument would dream of suggesting that the vehicle here referred to was a locomotive or motor tractor. Unless, therefore, this vehicle represents a casus omissus in the schedule, it falls either within the class of passenger vehicles or within the class of goods vehicles.

The information alleged that the vehicle was in truth and in fact within the class of goods vehicles, that is to say, within the class of "vehicles constructed or adapted for use for the "conveyance of goods or burden of any description." (Sch. I., cl. 2). The contention on the part of the present respondent was that it was not a goods vehicle, but a passenger vehicle. It was not, indeed, contended that it was not a vehicle at all; but the contention manifestly was that it was a passenger vehicle and had not been shown to be a goods vehicle. I cannot help thinking that in looking at this two-fold classification of passenger vehicles and goods vehicles the justices paid too little attention to the fact that in the definition of passenger vehicles there is the word "solely," while in the definition of goods vehicles that word "solely" is significantly absent. Passenger vehicles are "vehicles constructed solely for the "carriage of passengers and their effects." Goods vehicles on the other hand are vehicles constructed or adapted for use for

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the conveyance of goods or burden of any description; and, if they are constructed or adapted for use for the conveyance of goods or burden of any description, it matters not that they are not solely constructed or adapted for that use, but are also fitted to carry passengers. There can be no doubt after the decisions to which our attention has been directed that those words, "constructed or adapted" mean what one would naturally expect them to mean. They are both past participles, and the words mean "originally constructed," or, notwithstanding the original construction, subsequently adapted for use for the conveyance of goods or burden of any description. What is said here on the part of the prosecution is that this particular vehicle was originally constructed for use for the conveyance of goods or burden side by side with its use for the conveyance or carriage of passengers.

How is a tribunal to decide what is the use for which a particular vehicle is constructed? If the ingenuity of the designer is such as to devise a mode of construction which renders the vehicle from time to time easily adaptable for a particular use, then it is right to say that the vehicle is constructed for that use. Then the tribunal looks at the vehicle itself. We have not had the advantage of seeing it, but here are three illustrations of it. First of all we have a side-view of the elevation of the vehicle; then we have a side-view of the rear part with the doors open. Would any man, except, as the ancient philosopher said, for the purpose of maintaining a controversial position, say, when he looked at that vehicle, that it was a vehicle designed and constructed solely for the carriage of passengers and their effects? It would be a very odd thing if he did, whether he saw the car open or closed, especially if he saw it with the tail-board down, the back part cleared and the drop chains doing their work. Next the tribunal looks to see what the skilled constructor himself has said about the construction. No doubt advertising leaflets or folders are capable of exaggeration and are not completely to be accepted. But when the question is, what is the construction, why are we to be sceptical about the account given by the constructor himself, especially when it so plainly tallies with the illustrations given of the vehicle, and especially when he is describing not something ancillary or accidental or trivial in relation to the whole but the very essence of this vehicle as distinguishing it from other vehicles on the road or in the market ?

Now what is it that the constructor has to say about it ? He has said that the centre seats can be removed, if desired ; the rear seat may be removed leaving the spacious rear compartment free. Then he says : " The ease with which this " car can be converted to meet many different requirements, "its fine performance and riding comfort, and attractive "appearance, make it invaluable not only for shooting parties, "but for a score of other duties on the country estate. It is "many vehicles in one "—in other words it is deliberately put upon the market as a composite vehicle contrived like the piece of furniture in the verse " a double debt to pay." The constructor goes on to say it can be used "for station work and "all the other "—what ? Passenger requirements ? Not at all—" utility transport needs of a country house." Finally, comes the picture with the tail-board down. We are told : " The "tail-board is fitted with a compensating spring which makes "it easy to handle. It may be lowered flush with the floor to "facilitate loading, and is supported by strong covered drop "chains, providing extra space for a load when wanted." Speaking for myself I cannot imagine in what clearer way the constructor or designer of this vehicle could have expressed its composite construction, its construction for two quite different uses. If that is so, what becomes of the words in Sch. I. to the Act of 1934, to which the attention of the justices was never directed, " Vehicles constructed solely for the "carriage of passengers and their effects " ? Having looked at the vehicle and examined it, having considered what the designer has to say about it, the justices might fairly look at the use to which the vehicle was in fact being put, although that, in itself, would not be conclusive. We are told that the rear seat had been removed, the body had been boarded up to the roof with wood, and on the floor there were two hampers of flowers, a large bunch of flowers, a flower pot, a crate of trussed chickens, a box of eggs and a suit case. Manifestly the vehicle was exhibiting its utility for some, at least, of the utility transport needs of a country house. Part of the argument, not only in the court below, but also here, has appeared to be that the vehicle cannot be taken out of the category of passenger vehicles merely by the fact that it is used, or is constructed so as to be used, for the conveyance of goods or burden. Be it so. The mere fact that on a particular occasion a vehicle was being used for the conveyance of goods or burden, which no human ingenuity could represent as passengers' luggage or passengers' effects, would not be in the least degree conclusive if the other requirements were satisfied. But when it is said that the true view of this vehicle is that it was a passenger vehicle, the justices find themselves, or ought to find themselves, immediately face to face with the definition, "vehicles constructed solely for the carriage of passengers and "their effects." To hold that this vehicle was so constructed, except as I say as a matter of paradox or a matter of humour, in spite of its appearance, in spite of all we hear from all the most authoritative persons about it, and in spite of the user, would seem to me to be highly unjudicial. In my opinion it is apparent that the justices misconstrued these definitions and drew from the evidence before them an inference they could not reasonably draw. To put the thing in the mildest way, this vehicle really represents a colourable attempt to get the benefit of the higher speed for a vehicle ingeniously constructed to be a goods vehicle. It matters not whether it was at the same time contrived to be a vehicle not solely but in part for the carriage of passengers. It is, indeed, many vehicles in one, but as it is many vehicles in one, it does not fit into the first part of Sch. I. to the Act of 1934, and cannot be said to be constructed solely for the carriage of passengers. I think, therefore, that the justices made a twofold error in point of law, that this appeal ought to be allowed, and that the case ought to go back to the justices with a direction to find that the offence which was charged was proved.

DU PARCQ J. I agree. Sect. 10, sub-s. 1, of the Road Traffic

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Act, 1930, is in these words: "It shall not be lawful for any "person to drive a motor vehicle of any class or description on "a road at a speed greater than the speed specified in the "First Schedule to this Act as the maximum speed in relation "to a vehicle of that class or description, and if any person "acts in contravention of this section he shall be guilty of "an offence." By the Road Traffic Act, 1934, there has been substituted for Sch. I. to the Act of 1930 Sch. I. to the Act of 1934. It is, I think, plain that the Legislature intended Sch. I. to the Act of 1934 to be exhaustive. By s. 10, sub-s. 1, of the Act of 1930, the Legislature makes provision for every motor vehicle. The words are: "A motor vehicle of any "class or description." The offence in each case is the driving a motor vehicle at a speed greater than the speed specified. It follows that for every motor vehicle there must be in the schedule, unless the Legislature has wholly failed to carry out its intention, a specified speed. We ought to approach this Act on the assumption that the Legislature has not failed to carry out that intention, though, of course, one might be compelled to come to the regrettable conclusion that that assumption was wrong. But in my view it is plain that the Legislature has done what was intended, and has provided a schedule which does specify a speed for every motor vehicle.

In this world every motor vehicle is intended, I suppose, either to carry passengers or to carry goods, or to carry both passengers and goods. If one were merely asked without further help to distinguish between goods vehicles and passenger vehicles, obvious difficulties might arise, but in this case, when one looks at Sch. I. to the Act of 1934, one finds a definition of passenger vehicles, that is to say, "vehicles "constructed solely for the carriage of passengers and their "effects." It is impossible to approach this case, if a proper result is to be arrived at, without appreciating the importance of that definition, and I agree respectfully with my Lord that the magistrates fell into the error of trying to decide this case without giving full weight to those words.

It is said by Mr. Beyfus that, although this Court might not have taken the same view as the magistrates, and although the magistrates might have taken another view, we must respect the finding of fact; and he is, of course, right in saying that it is not for this Court to disturb what is really a finding of fact based upon evidence. But it is a mistake to suppose, where facts are found or conceded—many of the facts in this case are not in dispute—and then from those facts the magistrates have drawn an inference which it is impossible to maintain, that they can, by calling it a finding of fact, place themselves outside the jurisdiction of this Court.

I need not refer further to the facts; they are plain enough. Much light is thrown upon this case by the advertisement which was before the magistrates. Of course, no one would attach importance to a mere puff; a statement that a motor vehicle is capable of this or that performance is no evidence against anybody other than the one who made the assertion, but the importance of this leaflet is that it is a statement of fact which was not in dispute. Nobody suggests that these pictures of the vehicle in question are not accurate pictures. Nobody suggests that the account of the dimensions is not an accurate account of the dimensions; and when that is once granted, it is perfectly plain that the expressions relied upon here on behalf of the appellant are not mere advertisement; they are not a mere puff; they are perfectly matter of fact statements of something which is obvious to any person who either looks at the vehicle itself or looks at and understands the drawings of the vehicle.

The result is that the magistrates in this case have found facts which show that it is, as my Lord has said, paradoxical, having stated them, to draw the conclusion that the vehicle was "constructed solely for the carriage of passengers and "their effects"; and if once it is seen that that cannot be maintained, and that the case itself shows that this vehicle was constructed for purposes other than the carriage of passengers and their effects, that is to say, for the purpose of carrying goods other than the effects of passengers in the vehicle, it is plain that this vehicle, as it does not come within the first part of this exhaustive schedule, must come within either the second or third part. If nobody suggests that it comes within the third part of it, then it follows, and is to my mind clear to demonstration upon the case itself, that it must be a goods vehicle, so that the charge was made out.

For these reasons I agree with what my Lord has said and the judgment proposed.

ATKINSON J. I have had considerable doubt during the argument of the case as to what conclusion the Court ought to arrive at; but in the end I have come to a clear view, and I agree with what my Brothers have said. The respondent was charged with driving a vehicle, which came within the definition of a goods vehicle in Sch. I. to the Road Traffic Act, 1934, at a speed greater than 30 miles an hour. If that definition had stood alone, I think I should have come to the conclusion that it meant a vehicle constructed or adapted for use mainly or in substance for the conveyance of goods or burden of any description. If that were the true interpretation, I do not think that this vehicle would come within it; but it does not stand alone. There is the definition of passenger vehicles, where passenger vehicles are restricted to vehicles constructed solely for the carriage of passengers and their effects. I am quite sure that Parliament must have intended these two definitions to cover all the ground. They can only cover all the ground if a wider interpretation is put upon the definition of goods vehicles than I was at first inclined to give it. In view of the definition of passenger vehicle, and in view of my conviction that Parliament must have intended to cover all the ground, I do not think I am entitled to read words into the definition such as "mainly," or "in substance," or anything of that kind; but I must take the words that are there. Interpreting it in that way, I think it means vehicles constructed or adapted for use, among other purposes, for the conveyance of goods. If one of the objects of the construction is the conveyance of goods other than passenger effects, then I think the vehicle comes within the definition. Being driven to that view, I cannot see how it can be said that this vehicle was not constructed partly for the carriage of passengers and their effects, and partly for the carriage of goods other than passengers' effects. If that be so, it comes within what I think must be the proper interpretation of the definition of goods vehicles. Therefore the magistrates, in my view, ought to have convicted.

Appeal allowed.

Solicitors for appellant: *Corbin, Greener & Cook, for Thompson, Smith & Puxon, Colchester.*

Solicitors for respondent: *Lovell, White & King.*

W. L. L. B.

1937
Oct. 13, 29.

LEVER BROS., LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp duties—Conveyance or transfer on sale—Amalgamation of companies—Forty-one per cent. of capital in existing company previously acquired for cash—Issue of unissued capital by transferee company to acquire further 57 *per cent. of capital of existing company—Increase of capital " with a view to the acquisition of not less " than* 90 *per cent. of the issued share capital of any particular existing " company "—Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 55—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55, *sub-ss.* 1 (*b*), (*c*), (*ii*), (*B*), 2.

In 1919 the appellant company acquired for cash 41 per cent. of the issued share capital of the N. T. C. company. In 1936, in connection with a scheme for the amalgamation of the two companies, the appellant company acquired a further 57 per cent. of the issued share capital of the N. T. C. company in exchange for the allotment to the shareholders of the N. T. C. company of unissued share capital of the appellant company :—

Held, that the transfers of the shares which were executed to carry out the latter transaction were not exempt from stamp duty under s. 55, sub-s. 1 (B), of the Finance Act, 1927, since that sub-section contemplates the acquisition, by an issue of unissued capital, of not less than 90 per cent. of the share capital of an existing company, whereas the appellant company had acquired 41 per cent. of the share capital of the N. T. C. company for cash and only 57 per cent. by an issue of unissued capital.

CASE stated by Commissioners of Inland Revenue.

On August 24, 1936, two instruments were presented on behalf of the appellant company, Lever Bros., Ld. to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instruments were chargeable.

The instruments were transfers of shares. The first was a transfer under seal dated August 17, 1936, and made between London & New York Investment Corporation, Ld. as transferor, and the appellant company as transferee, whereby 1000 6 per cent. first preference shares of 1*l.* each, fully paid, in the New Transvaal Chemical Co., Ld. (hereinafter called the chemical Company), were transferred to the appellant company in consideration of the allotment by the appellant company to the London & New York Investment Corporation, Ld., of 857 7 per cent. cumulative preference shares of 1*l.* each in the appellant company, credited as fully paid as on July 1, 1936. The second was a transfer under seal, also dated August 17, 1936, and made between the Sterling Trust, Ld., as transferor, and the appellant company, as transferee, whereby 10,000 8 per cent. "A" preference shares of 1*l.* each, fully paid, in the chemical company were transferred to the appellant company in consideration of the allotment by the appellant company to the Sterling Trust, Ld., of 10,000 8 per cent. cumulative preference shares of 1*l.* each in the appellant company credited as fully paid as on July 1, 1936.

On April 23, 1936, the chemical company had an authorized capital of 650,000*l.* (divided into 200,000 6 per cent. first preference shares of 1*l.* each, 150,000 8 per cent. "A" preference shares of 1*l.* each, and 300,000 ordinary shares of 1*l.* each), of which 600,000*l.* had been issued, namely, 200,000 6 per cent. first preference shares, 150,000 8 per cent. "A" preference shares, and 250,000 ordinary shares all fully paid.

Since August, 1919, the appellant company had been the beneficial owner of all the issued ordinary shares in the capital of the chemical company. All those shares were acquired by the appellant company by allotment from the chemical company for cash.

On April 23, 1936, offers were made by the appellant company to the holders of the 6 per cent. first preference shares and the 8 per cent. "A" preference shares in the chemical company to acquire their shares in consideration of the allotment to them of cumulative preference shares in the appellant company. Those offers were accepted by the holders of 196,107 6 per cent. first preference shares, 140,705 registered 8 per cent. "A" preference shares, and share warrants in respect of 5091 8 per cent. "A" preference shares in the chemical company. Transfers to the appellant company of the preference shares in the chemical company were prepared and executed, two of the transfers being the subject of the present case.

On April 23, 1936, the amount of the nominal capital of the appellant company was 130,000,000*l.*, of which 61,369,584*l.*

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had been issued. Unissued share capital of the appellant company was allotted to the transferors of shares in the chemical company in accordance with the terms of the offers of April 23, 1936, to the amount of 168,091 7 per cent. and 145,796 8 per cent. cumulative preference shares of 1*l*. each.

The Commissioners assessed the transfers with ad valorem duty under the head of charge "Conveyance or Transfer on "Sale" in the Stamp Act, 1891, by reference to ss. 1 and 55 of that Act (1), and other relevant statutory enactments at the rate of 10*s*. per 50*l*. and every fractional part of 50*l*. of the value at the date of the transfer of the cumulative preference shares of the appellant company then transferred.

The appellant company appealed.

Sir William Jowitt K.C. and *James Wylie* for the appellant company. The company is entitled to the relief provided by s. 55, sub-s. 1 (B), of the Finance Act, 1927, since it issued unissued share capital "with a view to the acquisition . . . . "of not less than 90 per cent. of the issued share capital" of the chemical company. Those words in s. 55, sub-s. 1 (*b*), cover such a case as the present where a company has previously acquired some portion less than 90 per cent. of another company's share capital and then issues unissued share capital with a view to the acquisition of such further portion as will bring its total holding in that other company to not less than 90 per cent. of its issued share capital. If that were not so, no company which already had 11 per cent. of the share capital of another company could get the benefit of s. 55, sub-s. 1 (B), on its acquiring the share capital of another company on amalgamation.

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(1) By the Stamp Act, 1891, s. 55: "Where the consideration, "or any part of the consideration, "for a conveyance on sale consists "of any stock or marketable "security, the conveyance is to be "charged with ad valorem duty "in respect of the value of the "stock or security."

By Sch. I. to the Stamp Act, 1891, the stamp duty on a conveyance or transfer on sale is fixed on an ad valorem basis.

By the Finance Act, 1927, s. 55, sub-s. 1: "If in connection with "a scheme for the . . . . amal"gamation of any companies it is "shown to the satisfaction of the "Commissioners of Inland "Revenue that there exist the "following conditions, that is to "say—(*a*) that . . . . the "nominal share capital of a com"pany has been increased; (*b*) "that the [transferee] company ". . . . has increased its capital "with a view to the acquisition ". . . . of not less than ninety per "cent. of the issued share capital "of any particular existing com"pany; (*c*) that the consideration "for the acquisition . . . . con" sists as to not less than ninety " per cent. thereof—. . . . (ii) " where shares are to be acquired, " in the issue of shares in the trans" feree company to the holders of " shares in the existing company " in exchange for the shares held " by them in the existing com" pany; then . . . . (B) Stamp " duty under the heading 'Con" 'veyance or Transfer on Sale' in " the First Schedule to the Stamp " Act, 1891, shall not be charge" able on any instrument made for " the purposes of or in connection " with the transfer of the . . . . " shares . . . ."

Sub-s. 2: "For the purposes of "a claim for exemption under "paragraph (B) of sub-section (1) "of this section, a company which "has, in connection with a scheme "of . . . . amalgamation, issued "any unissued share capital shall "be treated as if it had increased "its nominal share capital."

Sir Donald Somervell A.-G. and *J. H. Stamp* for the Crown. The Commissioners were right. When s. 55, sub-s. 1 (*b*), refers to a company increasing its capital "with a view to the "acquisition . . . . of not less than ninety per cent. of the issued "share capital" of another company, it means the acquisition of the whole of that percentage of the share capital of the other company as the result of the increase of capital. Here the appellant company had acquired for cash more than 40 per cent. of the capital of the chemical company years before they issued unissued share capital with a view to the acquisition of preference shares which would result in their having a total holding of more than 90 per cent. of the capital of the chemical company. In those circumstances they cannot bring themselves within s. 55, sub-s. 1 (*b*), and are not entitled to the relief afforded by paragraph (B).

Cur. adv. vult.

1937. Oct. 29. LAWRENCE J. read the following judgment: The question in this case is whether two instruments whereby the appellant company took transfers of certain shares in another company in consideration of the issue of the appellant company's shares are exempt from stamp duty by virtue of s. 55 of the Finance Act, 1927.

The question turns mainly on the construction of sub-s. 1, paras. (*b*) and (*c*), of s. 55, in the following circumstances. The appellant company had acquired for cash several years ago all the ordinary capital of the New Transvaal Chemical Company, Ld., which amounted to 41 per cent. of its capital. By the instruments in question and other like instruments the appellant company acquired the chemical company's preference shares to the extent of over 50 per cent. of its total capital in consideration of the allotment to the holders thereof of unissued capital of the appellants.

In these circumstances it is contended for the appellant company that it has increased its capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of the chemical company and that the consideration for the acquisition consisted as to not less than 90 per cent. thereof in the issue of shares in the appellant company to the holders of shares in the chemical company within the meaning of s. 55, sub-s. 1 (*b*) and (*c*).

It is contended, on the other hand, for the Crown, and it has been held by the Commissioners, that the appellant company has not increased its capital with a view to the acquisition of not less than 90 per cent. of the issued share capital of the chemical company, because the appellant company only increased its capital with a view to acquiring 57 per cent. of that share capital, and that the consideration for the acquisition was not in shares but was partly in cash, if regard is had to the original acquisition of 41 per cent. of the share capital.

I am of opinion that the decision of the Commissioners is correct. It is no doubt true in one sense that the increase of capital was made with a view to the acquisition of not less than 90 per cent. of the share capital; but the more natural sense of the words of the section is, in my view, that the increase of capital must be made with a view to the acquisition of not less than 90 per cent. of the share capital in the sense that not less than 90 per cent. must be acquired by the increase of capital. A company does not, in my opinion, increase its capital with a view to the acquisition of 90 per cent. of share capital when it acquires 89 per cent.

without any increase of its capital and 1 per cent. by such an increase.

I think that this construction is supported by para. (*c*). The acquisition there referred to must be the acquisition referred to in para. (*b*) and the acquisition referred to in para. (*b*) is the acquisition of not less than 90 per cent. The consideration for the acquisition of 41 per cent. in the present case was cash and not shares.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant company: *J. M. B. Stubbs.*
Solicitor for the Commissioners: *Solicitor of Inland Revenue.*

G. F. L. B.

C. A.

1937

July 8, 9, 12.

TAYLOR *v.* TAYLOR.

[1935. T. No. 670.]

Revenue—Income tax—Deduction—Separation agreement between husband and wife—Provision for payment by husband to wife of specified sum per week—" Annual payment "—Right of husband " on making " such payment " to deduct income tax—Duty of wife on receipt of " residue " of annual payment to allow deduction—Certain annual payments fully made without deduction of tax—Later annual payments not yet fully made—Extent of husband's right to deduct tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *General Rules, r.* 19, *sub-r.* 1.

A separation agreement made in August, 1926, between a husband and wife provided that the husband should pay to the wife a specified weekly sum. The husband from time to time paid to the wife sums payable under the agreement without deducting the income tax thereon. In May, 1935, the wife brought an action against the husband claiming a sum as money remaining due to her under the agreement. It appeared that during the period from August, 1926, when the payments began, down to August, 1932, the husband had paid sums which were in the aggregate substantially equal in amount to those payable under the agreement for that period; but that during the subsequent period from August, 1932, to the date of the action he had paid in each year sums which were considerably less than were payable in that year under the agreement. The husband contended by way of defence that he would have been entitled under the Income Tax Act, 1918, General Rules applicable to All Schedules, r. 19, sub-r. 1, to deduct from each and all of the payments made by him income tax thereon at the current rate, leaving his wife to recover the amount of the tax from the income tax authorities, that as he had not deducted any of that tax he had overpaid his wife by the full amount thereof, and that as that amount exceeded the sum claimed by the wife she could recover nothing in the action:—

Held, that, although the sums payable under the agreement were payable weekly, yet, as they might continue for longer than a year, they were, within the meaning of r. 19, sub-r. 1, an " annual payment," from which, in so far as it remained unpaid, the husband was entitled to deduct income tax " on making " such payment," and on receipt of the " residue " of which the wife should allow the deduction, that as the husband had made the annual payment in full for each year down to 1932 he was no longer entitled to deduct tax in respect of these years, but that as he had not made that payment in full for any of the remaining years down to the time of the action and a residue remained payable in respect of these years he was entitled on making payment of that residue to deduct from his wife's claim thereto the amount of the tax thereon.

APPEAL from the judgment of MacKinnon J.

By an agreement in writing dated August 3, 1926, and made between Ernest Roger Taylor, thereinafter called "the husband," of the one part, and Elsie Elizabeth Taylor, thereinafter called "the wife," of the other part, which recited that differences had arisen between the parties, it was agreed (inter alia) as follows: "(1.) The parties shall live separately and apart "one from the other . . . . without any hindrance or "molestation by one party of the other. (2.) The husband "will pay to the wife . . . . the sum of two pounds per week "payable every Thursday, the first payment to be made on "the 12th day of August next, and whenever and while the "amount of the husband's earnings shall reach the sum of "twenty-five pounds or upwards in any month the husband "will cause to be paid . . . . the additional sum of one pound "per week. (3.) The wife shall have full right of discovery "and of investigation of the husband's books of account and "other documents for the purpose of ascertaining whether "the increased amount shall be payable. (4.) Should the "parties return to cohabitation this agreement shall from the "date of such return to cohabitation cease. . . . ."

Before and during the agreement the husband paid income tax on the whole of his income.

Since the date of the agreement the husband paid to the wife various sums out of his income purporting to be sums paid pursuant to the agreement, although they were not all of the amounts or paid at the times specified in the agreement.

On May 3, 1935, the wife brought the present action against the husband claiming by her writ of summons a sum which she alleged remained due to her under the agreement in respect of amounts payable thereunder down to the date of the writ.

The defendant in his defence stated (inter alia) that he denied that there was due from him to the plaintiff the amount claimed or any sum whatever.

On January 22, 1937, the action was tried by MacKinnon J. without a jury.

The following facts were proved or admitted: During the first two years from August 12, 1926, when the payments under the agreement were to begin, the defendant paid sums which were in the whole considerably less in amount than those due under the agreement during these years; but during the subsequent years down to August, 1932, he paid sums which were greater than those due under the agreement in these years; the result being that by August, 1932, the defendant had paid sums which were in the aggregate substantially equal in amount to those due under the agreement down to that time. During the period between August, 1932, and May 3, 1935, the date of the writ in the action, the defendant made in each year payments which were considerably less than those due under the agreement during that period. It was agreed that during the whole period from August 12, 1926, when the payments were to begin down to May 3, 1935, the date of the writ, the sums payable, if reckoned at 3*l.* per week, would amount to 1365*l.*; that during that period these sums if reckoned at 2*l.* per week would amount to 910*l.*: but that during that period the sums in fact paid by the defendant amounted to only 781*l.* 10*s.* The defendant admitted in evidence that for seven months in or about 1934 his earnings reached 25*l.* a month.

The contentions on behalf of the defendant in answer to the plaintiff's claim appear from the judgment of the learned trial judge as set out below.

MACKINNON J. This is a dispute between a husband and wife, arising under an agreement dated August 3, 1926, which was made between them that they should separate, and that the husband should pay to the wife a weekly sum as therein provided. [His Lordship read the agreement, stated the facts as above set out and continued as follows:]

On May 3, 1935, the wife issued the writ in this action claiming an amount which she says had not been paid to her according to the terms of that contract. It is apparent from the agreed figures that the defendant has in fact paid less than the full sum of 2*l.* per week, and considerably less than the full sum if it was to be at the rate of 3*l.* per week. The defendant, however, raises this point, that by virtue of various authorities, such as *Smith* v. *Smith* (1), he would have been entitled, when paying the 2*l.* per week, to deduct from that payment the proper amount of income tax at the then current rate, and that would have been, according to his legal obligation under the deed, a sufficient payment of 2*l.* per week. If he had done so, then under the Income Tax Act, 1918, the plaintiff would have had to give him a receipt, if he demanded it, for the 2*l.* per week in full; and some form of computation of the deduction of this tax should have been supplied to her, so that, if her income was within the taxable amount, she could recover from the income tax authorities the tax deducted, and in that way would ultimately receive the full 2*l.* per week, part of it from the defendant and the remainder as the income tax returned to her. The defendant says that, if the various weekly payments that he ought to have made under the agreement had been made subject to the deduction of the income tax that he might have deducted from these weekly payments, it would be apparent that the amount of that income tax is in excess of any sum which the plaintiff can allege is the balance due to her, that he has overpaid her, that at the date of the writ nothing was due to her, and therefore that the action must fail.

I think that it is clear from the various cases that if the defendant in making these payments had in terms made them subject to a deduction of income tax, he would have been entitled to do so; but I am satisfied that he never troubled himself about income tax, that it never occurred to him to make the deduction, that he simply sent the payments from time to time without deduction, and did not even go through the form of purporting to make any deduction, although no doubt on his own income he had in fact paid income tax. The fact that the defendant has never deducted the tax in terms, nor given the plaintiff any statement or certificate of having deducted it from his payments to her, is also very material for this reason, that she is not now, and never has

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(1) [1923] P. 191.

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been, in a position to claim anything by way of return of income tax.

It is said that the defendant is now prepared to give some sort of certificate that ever since 1928 he has been paying income tax, and therefore, I suppose, that a payment he has meanwhile made to the plaintiff under this agreement ought to be deemed to be subject to the deduction of income tax. I very much doubt whether the income tax authorities would pay her back these sums of money upon such a statement as that, and I am quite satisfied that they would not do so having regard to the deduction, or notional deduction, made as long ago as 1926 and 1927. The truth is, as I say, that the defendant never intended, and never did, make any deduction of income tax, and indeed never thought about the matter at all, and in those circumstances I think that the cases show that he cannot now make the deduction. There appears to be authority for saying that the tax must be retained from the payment at the time the payment is made, and if not so retained cannot as a general rule be retained out of future payments.

This is an attempt by the defendant to retain the tax and set it off as against the balance which has been left unpaid by the instalments already paid, and I think the attempt cannot succeed. To my mind the plaintiff is entitled to recover here, because she has not been fully paid her 2*l.* or 3*l.* per week less income tax with the opportunity of getting the balance from the income tax authorities. The question then arises, What is she entitled to? The sum paid is less than the sum to which she would have been entitled at 2*l.* per week by 128*l.* 10*s.* I have heard the defendant, and he admits that in the course of this period there were seven months in which his income did reach 25*l.* a month, and taking a month as four weeks, there were thus twenty-eight weeks for which she is entitled to 3*l.* instead of 2*l.* a week. The result is that she is entitled to recover 156*l.* 10*s.*

The defendant gave notice of appeal for an order that the judgment of MacKinnon J. might be reversed and that judgment might be entered for the defendant. The appeal was heard on July 8, 9 and 12, 1937.

Cyril King K.C. and *H. H. Maddocks* for the defendant, appellant.

The judgment of MacKinnon J. that the plaintiff was entitled to recover 156*l.* 10*s.* from the defendant was wrong and should be set aside.

The plaintiff is not entitled to recover any sum from the defendant. It is not disputed that, if the rights of the parties depended only upon the agreement into which they have entered, then during the period from August, 1926, when the agreement came into operation, to May, 1935, when the action was brought, a sum of 938*l.* would be owing to the plaintiff from the defendant, and, as the defendant has paid in all 781*l.* 10*s.* to the plaintiff, that there would be a balance of 156*l.* 10*s.* still owing to the plaintiff by the defendant. The learned judge has held that the rights of the parties depended only upon the agreement, and has, accordingly, given judgment for the plaintiff for that sum. The rights of the parties do not, however, depend only upon the agreement, but also upon the Income Tax Act, 1918, All Schedules Rules, r. 19, sub-r. 1 (1), which repeats in substantially similar terms a provision of the former Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 102. That sub-rule provides that where any annuity or other annual payment, whether payable half-yearly or at any shorter or more distant periods, is payable wholly out of profits or gains brought into charge to tax, the whole of those profits and gains shall be assessed and charged with tax upon the person liable to the annuity, and the person liable to make such payment shall be entitled on making such payment to deduct and retain thereout a sum representing the amount of the tax thereon, and the person to whom such payment is made shall allow the deduction upon receipt of the residue of the same. Under that sub-rule the defendant, having paid income tax on his own profits and gains out of which the weekly payments under the agreement were to be made, was entitled on making these payments to deduct income tax therefrom. If the defendant had regularly paid the sums payable under the agreement, less income tax, he would have completely discharged his liability under the agreement, and in that case the plaintiff could have recovered from the income tax authorities the amount of the deducted income tax and would thus have received in full the amount of the payments due to her under the agreement. The defendant has not in fact deducted income tax from any of the payments which he has made to the plaintiff under the agreement, and in making these payments he has thus overpaid her by the amount of the income tax thereon. The total amount of that income tax exceeds the amount of the plaintiff's claim for alleged arrears under the agreement and she cannot therefore maintain that claim. Though the defendant has made the payments without deducting tax, and in ignorance of his right to deduct it, he has not by so doing deprived himself of the right to rely

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(1) Income Tax Act, 1918, General Rules applicable to All Schedules, r. 19: "(1.) Where any yearly "interest of money, annuity, or any "other annual payment (whether "payable within or out of the "United Kingdom, either as a "charge on any property of the "person paying the same by "virtue of any deed or will or "otherwise, or as a reservation "thereout, or as a personal debt "or obligation by virtue of any "contract, or whether payable "half-yearly or at any shorter "or more distant periods), is "payable wholly out of profits "or gains brought into charge "to tax, no assessment shall be "made upon the person entitled "to such interest, annuity, or "annual payment, but the whole "of those profits or gains shall be "assessed and charged with tax "on the person liable to the "interest, annuity, or annual "payment, without distinguishing "the same, and the person liable "to make such payment, whether "out of the profits or gains "charged with tax or out of any "annual payment liable to deduction, or from which a "deduction has been made, shall "be entitled, on making such "payment, to deduct and retain "thereout a sum representing "the amount of the tax thereon

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"at the rate or rates of tax in "force during the period through "which the said payment was "accruing due.

"The person to whom such "payment is made shall allow "such deduction upon the receipt "of the residue of the same, and "the person making such de- "duction shall be acquitted and "discharged of so much money "as is represented by the deduction, "as if that sum had been actually "paid."

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upon the overpayment thereby made to the plaintiff as a defence to the plaintiff's claim.

[SLESSER L.J. Under r. 19, sub-r. 1, the person liable to the annual payment is only entitled to deduct income tax "on making such payment."]

At no time since the agreement came into operation has the defendant fully made the payment due from him thereunder, and therefore he has never lost his right under the rule to deduct from his payments the amount of the tax thereon, and he is still entitled to deduct tax in respect of all his payments since the first.

Even if the payment contemplated by the rule is an annual payment, the person liable to make it does not make it until he makes the last payment for the year, and he is entitled to deduct tax from the payments down to the time when the last payment is made for the year, or he can wait until the end of the year and deduct the tax when he makes the final payment. A weekly payment which may continue for a year may be an annual payment within the meaning of the rule: *Smith* v. *Smith.* (1)

In *Devaynes* v. *Noble, Clayton's Case* (2) the rule has no doubt been laid down that in certain cases, in the absence of any evidence showing a contrary intention, the earlier payments of a debtor are to be appropriated to his earlier debts, so as to extinguish the earlier debts first. If that rule applied here, there might be some ground for saying that the later payments of the defendant should be attributed to his liabilities for the earlier years so as to complete his payments for these years and prevent him from deducting income tax in respect of them. It has, however, been laid down in *Cory Brothers & Co., Ld.* v. *Owners of the Turkish Steamship "Mecca"* (3) that that rule does not apply to a case where there is no account current between the parties, nor where from an account rendered or other circumstances it appears that the creditor intended not to make any appropriation but to reserve his right. In the present case there was no account

(1) [1923] P. 191.
(2) (1816) 1 Mer. 572, 585, 608.
(3) [1897] A. C. 286.

current between the parties. Further, it is clear that the plaintiff never intended to appropriate the defendant's later payments to the earlier years and so complete his payments for these years, because she claims for underpayments in respect of each year separately. Neither has the defendant so far appropriated his later payments to his earlier liabilities. The defendant, however, is now entitled to allocate his overpayments in some of the later years to his underpayments in the earlier years, and in thus completing the making of his payments for these earlier years, to deduct tax in respect of these years.

On any reckoning, if the defendant's right to deduct income tax be taken into account, the plaintiff has already been overpaid.

The reported decisions on the whole give support to the case of the defendant. The case of *Crane* v. *Kilpin* (1) is an authority for the contention that on payment of the arrears of an annuity income tax may be deducted. In *Shrewsbury* (*Countess*) v. *Shrewsbury* (*Earl*) (2) it was held that a husband might deduct income tax from arrears due to his wife, though not from the payments already made. In *In re Wooldridge. Wooldridge* v. *Coe* (3) it was held that the executors of a husband were entitled to deduct income tax in respect of past payments to his wife and also of the balance due to her. In the Scottish case of *Fletcher* v. *Young* (4) the decision was no doubt against the contention of the present defendant, but that decision is not binding on any English Court, and, further, it is submitted that it is wrong, because too narrow a view was there taken of the meaning of the expressions in r. 19 "on making such payment" and "thereon." As to the case of *In re Hatch; Hatch* v. *Hatch* (5), in which it was held that past overpayments in respect of income tax made by a husband to his wife under a mistake of law were not recoverable from the wife as a debt, and could not be deducted from future payments of the annuity, that case is distinguishable

(1) (1868) L. R. 6 Eq. 334.
(2) (1906) 23 Times L. R. 100.
(3) [1920] W. N. 78.
(4) 1936 Sc. L. T. 572.
(5) [1919] 1 Ch. 351.

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from the present case, because there had there been payment in full without deduction of tax, whereas here the husband has not paid in full and is entitled to deduct tax from future payments.

I. H. Jacob for the plaintiff, respondent. The judgment appealed from is right.

The obligation of the defendant under the separation agreement is to pay to the plaintiff a weekly sum of 2*l.*, or in certain circumstances of 3*l.*, which at the date of the agreement might continue and has since in fact continued for more than a year and is thus an annuity. It is true that the Income Tax Act, 1918, All Schedules Rules, r. 19, sub-r. 1 (1), provides that where any annuity or other annual payment, whether payable half-yearly or at any shorter or more distant periods, is payable as therein mentioned, the person liable to make such payment shall be entitled "on making such payment" to deduct and retain thereout the income tax thereon. That sub-rule does not, however, mean, as the defendant contends, that so long as the person liable to the annuity has not made payment in full of the sums due from him he is entitled to deduct income tax in respect of all these sums. The authorities have established that, where a periodical sum is payable weekly or at any other interval shorter than a year and the payment of it may continue for more than a year, the yearly aggregate of the sums is the same as an annuity or annual payment, and the right to deduct income tax must be exercised on the making of each payment and not later. In *Smith* v. *Smith* (2) Lord Sterndale M.R. said (3): "The "first question is whether the payment is an annual payment" within the provision there under consideration. "I can "see no reason why it is not. It is no doubt payable weekly, "but that fact does not prevent it from being an annual "payment if the weekly payments may extend beyond a "year"; and Warrington L.J. there said (4): "Again the "fact that the payment is to be made weekly does not prevent "it from being annual provided the weekly payments may

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(1) See note (1) ante, p. 325.
(2) [1923] P. 191.
(3) [1923] P. 196.
(4) Ibid. 201.

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"continue beyond the year." In that case the Master of the Rolls cited in support of his statement the cases of *In re Cooper* (1) and *In re Janes' Settlement.* (2) Though the payment in such a case is an annual payment, each sum paid in respect of that annual payment is paid outright, and income tax cannot be deducted in respect of the payment after it has been made: *Fletcher* v. *Young.* (3) If the person liable to pay the weekly sum does not deduct income tax from it at the time of payment, he loses his right to do so: *Galashiels Provident Building Society* v. *Newlands.* (4) Construed in the light of these authorities, r. 19, sub-r. 1, means that the person liable to the annuity who has paid sums in respect of it is no longer entitled to deduct income tax from these sums, or from the whole annuity on paying the last instalment due in respect of it. In the present case the obligation of the defendant was to pay an annuity, but to pay it in weekly sums. He had a right to deduct income tax from each weekly sum on making payment of that sum, but not afterwards. He has paid weekly sums without deducting tax, and he has no longer any right to deduct tax in respect of these sums. According to the rule in *Clayton's Case* (5) the creditor is entitled to appropriate payments made by the debtor to the discharge in the first place of the earlier debts. The plaintiff is therefore entitled to appropriate the whole of the sums paid by the defendant, so far as they will go to the complete discharge of his earlier liabilities under the agreement, the result being that the defendant has discharged these earlier liabilities in full and is no longer entitled to deduct income tax in respect of them. Another reason why the defendant is not entitled to deduct income tax in respect of his past payments is that he never informed the plaintiff of his intention to make the deduction so as to enable her to recover the amount of the tax from the revenue authorities, and it is now too late for her to do so. As to the overpayments which the defendant made in certain years,

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(1) [1917] W. N. 385.
(2) [1918] 2 Ch. 54.
(3) 1936 Sc. L. T. 572.
(4) (1893) 20 R. 821.
(5) 1 Mer. 572, 585, 608.

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he cannot now recover these back or take credit for them or deduct tax in respect of them, because they were not payments made under the agreement, but mere voluntary payments which the defendant was under no obligation to make. It is agreed that if all the payments which the defendant has made to the plaintiff be deducted from all the payments which he was bound to make under the agreement down to the date of the action, there is a net balance due from the defendant to the plaintiff of 156*l.* 10*s.*, and, if the defendant is entitled to deduct any tax at all, it is at most the tax on that sum, which would be about 40*l.*, leaving a sum due to the plaintiff of about 116*l.*

Cyril King K.C. replied.

GREER L.J. In this case the plaintiff and the defendant, who is her husband, entered into a separation agreement dated August 3, 1926, under which the plaintiff was entitled to be paid in some circumstances 2*l.* a week and in other circumstances 3*l.* a week.

This Court, on consideration, has come to the conclusion that during the two years from August, 1926, to August, 1928, the defendant underpaid the plaintiff, contributing less than was due to her under the agreement, and that during the four years following, from August, 1928, to August, 1932, he overpaid the plaintiff, contributing more than was due under the agreement. In my judgment the overpayments in these later years could only have been made by the defendant, and were in effect made by him, for the purpose of reducing his indebtedness under the agreement in respect of the two earlier years. By August, 1932, the amount due to the plaintiff under the agreement down to that time had been substantially paid in full.

Subsequently there were again underpayments in each year.

On May 3, 1935, the plaintiff brought the present action against the defendant, claiming an amount alleged to be due to her under the agreement. The defendant contended that he was entitled to deduct income tax from the payments

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which he made to the plaintiff, that the amount of the income tax which he might have deducted exceeded the amount of the plaintiff's claim, and that nothing was due from him to the plaintiff.

The learned trial judge, MacKinnon J., as he then was, found that when the defendant made his payments to the plaintiff he had not the least idea of deducting income tax from any of them, and the net result was that he found that at the date of the action a balance of 156*l.* 10*s.* remained payable by the defendant to the plaintiff under the separation agreement.

On appeal to this Court it is again contended on behalf of the defendant that he is entitled to deduct income tax from the payments made by him.

The right of the defendant to deduct income tax from the payments made by him under the agreement depends upon the Income Tax Act, 1918, General Rules applicable to All Schedules, r. 19, sub-r. 1. It is there provided that, where any annuity or other annual payment, whether payable half-yearly or at any shorter or more distant periods, is payable wholly out of profits or gains brought into charge to tax, the whole of those profits or gains shall be assessed and charged with tax on the person liable to the annuity or annual payment, and the person liable to make such payment shall be entitled on making such payment to deduct and retain thereout a sum representing the amount of the tax thereon, and that the person to whom such payment is made shall allow such deduction upon receipt of the residue of the same. Under that sub-rule it would seem that the payment in respect of which the deduction is allowed is an annual payment, that the person liable to the annuity is entitled to make the deduction " on making such payment," and that the person to whom the payment is made shall allow the deduction upon receipt of the " residue " of the payment.

In the present case the defendant by August, 1932, had made in full the payments for which he was so far liable without deducting income tax, and he was therefore no longer entitled under the sub-rule to deduct tax in respect of these

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payments. As to the period between August, 1932, and the date of the writ in the action, the defendant had not fully made the payments so as to prevent him from deducting tax. A "residue" within the meaning of the sub-section remained to be paid by the defendant to the plaintiff in respect of these years under the separation agreement which he had not yet made up at the date of the writ. From that residue the defendant was entitled, on making payment of the amount due, to deduct and retain thereout a sum representing the amount of the income tax thereon, and the plaintiff was bound on receipt of that residue to allow deduction of tax therefrom by the defendant. We have come to the conclusion that the defendant was entitled at the date of the writ to deduct from the 156*l.* 10*s.* then remaining due from him under the agreement the amount of the income tax on that sum. It does not seem to me to matter for this purpose whether the agreement bound the defendant to make the payments weekly or yearly, because his intention to deduct or not to deduct income tax could be equally well shown whether the agreement bound him to make the payments weekly or yearly.

In the circumstances some deduction ought to have been made in favour of the defendant in respect of income tax on the sum of 156*l.* 10*s.* remaining due to the plaintiff under the agreement in respect of the residue unpaid during the period from 1932 to the date of the writ. At the then current rate of income tax a reasonable deduction in respect of income tax on that sum would be about 40*l.* In my opinion the judgment for the plaintiff ought therefore to be reduced from 156*l.* 10*s.* to 116*l.* On that view the defendant's appeal succeeds to that extent, though it fails on his main contention that nothing is due from him to the plaintiff.

SLESSER L.J. I agree.

The Income Tax Act, 1918, All Schedules Rules, r. 19, sub-r. 1, provides that, where an annuity or other annual payment is payable wholly out of profits or gains brought into charge to tax, the whole of those profits or gains shall be assessed and charged with tax on the person liable to the annuity or annual payment, and the person liable to make such payment shall be entitled on making such payment to deduct and retain thereout a sum representing the amount of the tax thereon.

In the present case a separation agreement, made in August, 1926, between the plaintiff and her husband, the defendant, provided that the defendant should pay to the plaintiff the sum of 2*l.* a week, or in certain circumstances of 3*l.* a week. The defendant, on paying to the plaintiff from time to time sums payable under the agreement wholly out of profits or gains in respect of which he had suffered income tax in accordance with the first branch of r. 19, sub-r. 1, thereupon became entitled under the latter branch of that sub-rule to deduct and retain thereout the amount of the tax thereon at the rate of tax in force during the period through which the payments were accruing due. The defendant was in fact ignorant of that sub-rule and he made his payments, whether in full, defective, or excessive, without regard to his right to deduct income tax thereunder.

During the period from August, 1926, when the payments began, to August, 1932, the defendant made payments, which during the two earlier years of that period were in arrear, and during the later years of that period were in excess, of the amounts due under the agreement. It does not appear that the defendant made the overpayments in these later years with any other design than that they should go in abatement of the underpayments during the two earlier years. It is not necessary in this case to consider *Devaynes* v. *Noble, Clayton's Case* (1), or the difficult questions which may arise in applying the presumption of law as to the appropriation of receipts and payments in the case of a current account. In the case of *In re Hallett's Estate; Knatchbull* v. *Hallett* (2) Jessel M.R., after referring to the rule in *Clayton's Case* (1) as a very convenient rule, went on to say (3): "I "have nothing to say against it unless there is evidence either

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(1) 1 Mer. 572, 585, 608.
(2) (1879) 13 Ch. D. 696.
(3) 13 Ch. D. 696, 728.

"of agreement to the contrary or of circumstances from which "a contrary intention must be presumed, and then of course "that which is a mere presumption of law gives way to those "other considerations." Here it is not necessary to draw any deduction of law, but only to have regard to the fact that the defendant intended the overpayments to make up for the earlier underpayments. By the sub-rule already mentioned the defendant was entitled on making each of these payments to deduct thereout the income tax thereon, but he made no deduction of tax from any of these payments. By August, 1932, he had made payments equalling in amount the whole of the weekly sums that were due from him down to that time without making any deduction in respect of income tax, and, the right to deduct tax given by the sub-rule being a right to do so " on making such payment " and not otherwise, his right of deduction in respect of these payments was gone.

After August, 1932, however, the position was different. Since that time the defendant was always in arrear with his payments, and in no year had he so made them as to prevent him from availing himself of the right given by the sub-section of making the deductions of income tax. The period in respect of which he is entitled to make deductions extends over two and a half years, from August, 1932, to May, 1935, when the action was brought. The learned judge has found that under the terms of the agreement the defendant owed the plaintiff 156*l*. 10*s*. in respect of that period. But under the sub-rule the defendant was entitled to deduct from that sum income tax at the then current rate, which would amount to about 40*l*. The amount owing by the defendant to the plaintiff may thus be fixed at 116*l*.

As to the argument that under the agreement the payments were made by the week and not by the year, it is not right in my opinion to have regard to that fact in considering the deduction of tax under r. 19, sub-r. 1. The authorities lay it down that where an agreement provides, as this agreement provides, for the payment of a sum in periods of less than a year which may continue for more than a year, that payment

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is an annuity. Moreover the case of a sum payable in periods of less than a year which may extend over a year seems to be expressly reserved as the case of an annual sum by r. 19, sub-r. 1, which points in such a case to the year as the standard, and not to the half-year or any shorter period, speaking as it does of any "annuity or any other annual payment . . . . "whether payable half-yearly or at any shorter or more distant "periods." Whenever, in such a case, the payment for the whole year in question has not been made, it is still open to the person liable to make the payment to deduct and retain thereout the income tax thereon, notwithstanding that for some weeks during that year the payments were made in full.

SCOTT L.J. I agree.

Appeal allowed in part.

Solicitors for appellant: *Montagu's and Cox & Cardale.*
Solicitors for respondent: *Jacques, Asquith & Jacques.*

J. R.

DAVIES *v.* ELMSLIE.

K. B. D.
1937
Oct. 14, 15;
C. A.
Nov. 23.

[1937. D. No. 431.]

Contract—Public policy—Agreement by married woman with third party to give up consortium of her husband—Validity—Point of law on pleadings.

The plaintiff, a married woman, in her statement of claim alleged an agreement whereby "in consideration of the plaintiff "persuading her husband to go to New Zealand and/or consenting "to forego the consortium of her said husband" the defendant, a third party, promised to pay her a weekly sum, and that she had foregone the consortium of her husband. The defendant in his defence alleged that the agreement was founded on an illegal consideration and was against public policy. This point of law was set down for argument under Order xxv., r. 2.

Held, by Lewis J., that there was no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie, and that, in the absence of proof of facts showing that this contract was against public policy, it was enforceable.

Dictum of Lord Thankerton in *Fender* v. *St. John-Mildmay* [1938] A. C. 1, 24 adopted.

Held, by the Court of Appeal, that the contract, as pleaded in the statement of claim, was not an agreement for separation of husband and wife, and that the consideration for the promise was not intended to be the consent of the wife to forego the consortium of her husband, and that therefore the contract alleged in the pleading was not illegal and void.

Decision of Lewis J. affirmed on other grounds.

HEARING of a point of law set down under Order xxv., r. 2.

The plaintiff, a married woman, brought this action against the defendant for breach of contract. The statement of claim by para. 2 stated: "In or about the month of January, "1936, the plaintiff and defendant entered into an agreement "whereby in consideration of the plaintiff persuading her "husband to go to New Zealand and/or consenting to forego "the consortium of her said husband, the defendant promised "to pay to the plaintiff an allowance at the rate of 4*l.* per "week until either the defendant should pay the plaintiff's "passage to join her said husband in New Zealand or the "defendant should pay her said husband's passage back to

"England." By para. 4: "In pursuance of the said agreement "the plaintiff persuaded her said husband to go to New "Zealand, and her said husband duly sailed therefor on or "about January 20, 1936, and the plaintiff has ever since "foregone the consortium of her said husband." The statement of claim stated that the contract was partly oral and partly in writing, the date of the last of the letters forming the agreement which were set out in the particulars being January 17, 1936. The statement of claim then alleged cessation of payments by the defendant since January 12, 1937, and further alleged that "the plaintiff is and always "has been ready and willing to join her said husband."

By his defence the defendant alleged that the contract was founded upon an illegal consideration and was contrary to public policy. This point of law was then set down as aforesaid.

R. A. Willes for the defendant. This agreement is founded on an illegal consideration and is void as being against public policy, because made in contemplation of the separation of married persons: *Brodie* v. *Brodie* (1); *Logan* v. *Birkett* (2), per Leach M.R.; and *H.* v. *W.* (3). In *In re Moore; Trafford* v. *Maconochie* (4) a legacy left in contemplation of the beneficiary living apart from her husband with whom she was then living was held void. This case was distinguished in *In re Lovell; Sparks* v. *Southall* (5), where a testator bequeathed money to a woman who had been deserted by her husband "provided and so long as she shall not return to live with "her present husband." The legacy was held good on the ground that the object of the bequest was not to induce the beneficiary not to return to her husband, but to maintain her until she did. In the present case the separation took place after the agreement. This is clearly an agreement by the wife to separate and would be an answer to a claim by her for desertion. And she agrees not only to put an end to physical relations with her husband, but also to abandon all marital rights. She has to separate from her husband in order to get the 4*l*. a week.

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(1) [1917] P. 271.
(2) (1833) 1 Myl. & K. 220, 225.
(3) (1857) 3 K. & J. 382.
(4) (1888) 39 Ch. D. 116.
(5) [1920] 1 Ch. 122.

Sir Reginald Coventry K.C. and *W. M. Andrew* for the plaintiff. This is the simple case of a young man who is going abroad and some one has to look after his wife. If this agreement is held to be unenforceable, no father or father-in-law can make a valid agreement in such circumstances to support his daughter. It is said to be against public policy; but Jessel M.R. in *Printing and Numerical Registering Co.* v. *Sampson* (1) said that public policy demanded that persons of full age should have freedom of contract, which should not lightly be interfered with. Even assuming that an agreement for future separation might be said to be against public policy, here the agreement and the separation were practically contemporaneous, and as such will be enforced by the Court: per P. O. Lawrence J. in *In re Lovell; Sparks* v. *Southall* (2); and there is no distinction in principle between provisions made in a separation deed for the wife by the husband and provisions made for her by any other person. (2) Lord Thankerton in *Fender* v. *St. John-Mildmay* (3) said that there is no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the obligations of the marriage tie. No permanent separation was contemplated by this agreement.

R. A. Willes in reply. Ordinary separation deeds always recite that unhappy differences have arisen by reason whereof the spouses have agreed to live apart, so that the agreement merely gives effect to what has already taken place. Here the separation took place after the agreement was made. When it was made, it was not known whether the persuasion of the wife would be successful, and the separation was a consequence of the agreement, which was designed to produce that separation.

1937. Oct. 15. LEWIS J. [after reading paras. 2 and 4 of the statement of claim as set out above, continued:]

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(1) (1875) L. R. 19 Eq. 462, 465.
(2) [1920] 1 Ch. 122, 127.
(3) [1938] A. C. 1, 24.

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Para. 5 reads: "The defendant paid to the plaintiff an "allowance at the rate of 4*l*. a week until January 12, 1937, "but has failed and neglected to pay her the said 4*l*. a week "or any other sum since such last mentioned date. Further, "the plaintiff is and always has been ready and willing to "join her said husband," and then follows the claim for relief.

The defence traverses the allegations other than the allegation contained in para. 1 of the statement of claim, namely that the plaintiff was the wife of Hugo Harold Davies and resides at Shrewsbury. Para. 3 of the defence sets out an alternative defence to the effect that if any agreement was made at all between the parties, the defendant made the agreement as agent for the husband's mother, and he says that he is not personally liable therefor. The only other matter in the defence which requires attention is para. 5, which says: "Further the defendant says and will contend "that the contract alleged and relied upon by the plaintiff "and the performance alleged on her part is founded upon "an illegal consideration and contrary to public policy and "void."

When that defence was put in, application was made under Order XXV., r. 2, that the point of law raised by para. 5 of the defence "be set down for hearing in Middlesex by Judge alone "and disposed of forthwith and before trial of the issues of "fact in this action and it is certified this issue be fit for a "speedy trial."

In considering the issue I am entitled to look at the record as a whole, and the defendant has to argue the case on the footing that all the statements in the statement of claim are correct. I am not entitled, however, to go outside what appears on the record, or to inquire into the motives which actuated the parties into making the agreement, or to hear evidence as to the circumstances in which it was made. All I know, and all it would seem I am entitled to know of the circumstances of the case is that the plaintiff is a married woman, the wife of Hugo Harold Davies, and that he left this country on January 20, 1936, and that the defendant is apparently no relation of either the plaintiff or her husband, although, as I have said, in the defence the defendant suggests that he was the agent of the husband's mother. I also know that up to January 12, 1937, the defendant paid what he had agreed to pay and that he has ceased since that date to pay 4*l.* per week; that he has failed to pay the plaintiff's passage to New Zealand, or the plaintiff's husband's passage back from New Zealand to this country, and that the plaintiff is and always has been ready and willing to join her husband in New Zealand. One other thing appears from the statement of claim, and that is this: the defendant appears to have been throughout the negotiations and throughout the making of the contract represented by solicitors. The plaintiff, on the other hand, has been, as far as one can infer from the pleadings, throughout unrepresented.

There is one other matter. The agreement as pleaded does not appear to me necessarily to contemplate a complete separation of husband and wife. Of course, the wife at any time could, by no longer agreeing to forego the consortium of her husband, go back to her husband, thereby, of course, losing the 4*l.* per week. On the other hand, the defendant at any time, simply by paying the plaintiff's passage money to New Zealand, or the plaintiff's husband's passage money back from New Zealand to England, could get out of paying his 4*l.* per week and could ensure, as far as it is humanly possible, that the separation of husband and wife should terminate.

Mr. Willes, who argued this case for the defendant, puts his proposition quite concisely in these words: "Any contract "in relation to married persons who are living together at "the time of the making of the contract is void, if that contract "contemplates their future separation. The inference to be "drawn from the statement in the statement of claim is that "the plaintiff and her husband were living together when "the contract was made; that the plaintiff had not foregone "the consortium of her husband before January 17, 1936, "at the earliest, and it was not until after the agreement was "made that the plaintiff and her husband ceased to live "together."

Authorities were cited to me in support of that proposition by Mr. Willes. In *Brodie* v. *Brodie* (1) it was held that an agreement made before marriage that the parties, when married, should not live together was void as against public policy. In the case of *H.* v. *W.* (2) it was held that any agreement made before or after marriage, which contemplates the voluntary separation of husband and wife, is void and against public policy. In that case there was a limitation for the benefit of the husband in the event of the wife leaving home without cause. The learned Vice-Chancellor held that such a limitation was void, as it was a direct inducement to the husband to permit a state of separation capriciously commenced by the wife to continue. The next case which was cited to me was *In re Moore; Trafford* v. *Maconochie.* (3) In that case the Court decided that a bequest of a weekly allowance to a married woman living at all material times with her husband, during such time as she might live apart from her husband, was void. Cotton L.J., when that case went to appeal, points out (4) that the avowed object of the bequest was to induce the wife, who was the testator's sister, to live apart from her husband, who was not on speaking terms with the testator. Cotton L.J. goes on to say, having stated that the apparent object was to induce the wife to live separate from her husband: "If so, the gift was for a purpose which is "contrary to the law of England, for that law does not allow "provisions made in contemplation of a future separation "between husband and wife." It is clear that in that case the Court had before them some evidence of the intentions and motives of the testator, and the learned Lord Justice seems to emphasize that as the purpose of the gift was to induce a separation, the gift was void. The other case cited to me was the case of *In re Lovell; Sparks* v. *Southall.* (5) In that case the testator bequeathed to a married woman with whom he was living an annuity of 750*l.*, which was to be paid to her if she was living with him at the time of his death, for so long as she did not return to her husband and did not remarry. In either of those events, the annuity was to be reduced to 250*l*. The Court held that the bequest was not void, because (see the headnote) "its object was not to induce [the woman] "to continue to live apart from her husband and not to "remarry but to maintain her until she returned to her husband "or remarried." Here again the learned Judge appears to have considered the object for which the bequest was made, and it was considered that the object was a relevant and material matter for consideration. After stating (1) in the clearest terms that the law of England does not allow gifts made in contemplation of a future separation between husband and wife and referring to Cotton L.J. in *In re Moore* (2) as his authority, Lawrence J., as he then was, goes on to say (3): "It has long been settled that in the case of separation deeds "provisions made for maintenance during the separation "are valid and will be enforced by the Courts, the reason "being that in such cases the separation has already taken "place or at all events is in immediate contemplation. So "far as the policy of the law is concerned there is in my opinion "no distinction in principle between provisions made in "separation deeds and provisions made in any other instruments nor (as has been suggested) between provisions made "for a wife by a husband and provisions made for a wife by "any other person. In the case of a provision made by a "stranger the Court would no doubt more readily come to the "conclusion that the object and purpose of the provision was "not to afford maintenance for the wife during the period of "separation but to induce the wife not to return to her "husband. In the absence however of any evidence showing "that the provision was made for an illegal purpose the Court "would in my opinion uphold a provision for the maintenance "of a married woman whilst living apart from her husband "where the separation had already taken place at the date "when the provision was made, and that whether the provision "was made by the husband himself or by any other person."

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(1) [1917] P. 271.
(2) 3 K. & J. 382.
(3) 39 Ch. D. 116.
(4) 39 Ch. D. 128.
(5) [1920] 1 Ch. 122.

(1) [1920] 1 Ch. 126.
(2) 39 Ch. D. 116, 128.
(3) [1920] 1 Ch. 127.

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It is to be observed in the last sentence Lawrence J. was saying that the Court, in the absence of any evidence that there was any illegal purpose, would uphold an agreement where the separation had already taken place at the date when the contract was made; but I cannot help thinking in view of the first paragraph of the part of the judgment quoted, where he says that the Court will enforce provisions in deeds where separation has already taken place, or, at all events, is in immediate contemplation, that he was not excluding the case where separation was in immediate contemplation.

As I stated at the beginning of this judgment, I have no evidence whatever before me as to the motive which induced this agreement, and I have said that I know nothing whatever about the parties, except what I can glean from the statements made in the statement of claim. There is, as far as I know, no separation deed as between husband and wife. The wife is, and always has been, ready and willing to join her husband. What the husband's attitude is, I know not. As the contract is pleaded in the statement of claim, it may be interpreted as being in no sense contra bonos mores; on the other hand, it may have a very sinister significance. If Mr. Willes's argument is right, it seems to me that the Court would be bound to say that an agreement in the terms of the agreement as pleaded in the statement of claim, in a case where the facts were as follows, which I put to Mr. Willes during the argument, would be an agreement void as against public policy. A father has a daughter who is married. The husband, who is as devoted to his wife as the wife is to the husband, gets an opportunity of being given employment in some part of the world where it is almost impossible for a white woman to live; suppose employment for two years. The husband, because of his devotion to his wife, although he realizes that the employment is one which will stand him in good stead in the future, says: "No, I am not going to take it, as I do not like "parting from you." The wife does not wish to be parted from her husband, but realizes as does the father that it is going to be the making of the boy. The husband says: "I cannot "afford two establishments" and the father says to his

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daughter: "Very well, if you will persuade Jack"—or whatever his name may be—"to take this job, which he "realizes, and everybody else realizes, is a very good job "for him, for two years, and live apart from him for two years, "I will see that you do not starve and I will make you an "allowance of 5*l*. a week." I confess that, unless I am bound so to hold, I would not have thought that that sort of agreement was an agreement which was void as against public policy. I put that case to Mr. Willes, and Mr. Willes felt bound to say that, it being an agreement which contemplated the future separation of spouses, the law says that it would be void.

When Sir Reginald Coventry addressed me for the plaintiff, he referred me to the opinion of Lord Thankerton in a case of *Fender* v. *St. John-Mildmay* (1), who in that case was dealing with the question of public policy. Lord Thankerton points out that separation agreements have been treated as lawful although such agreements limit consortium between husband and wife; but adds that such agreements have been held to be valid, and are valid, unless they are merely contingent on a future stage of separation. I venture to think that by adding those qualifications, the learned Lord was not excluding cases such as were referred to by Lawrence J., where, at the time of making the agreement, separation was in immediate contemplation, although at the time of making the separation deed there was no physical separation at all. I do not think that Lord Thankerton was excluding the case which was put by Lawrence J. It seems to me that there must be many cases where the parties are not actually living apart when the agreement to separate, which has been in contemplation for some time, is made. Lord Thankerton goes on in his opinion to say this (1): "This consideration makes clear to my mind, "with all respect to my noble and learned friends who hold a "contrary view, that there is no general principle of public "policy that no contract is enforceable, which is inconsistent "with maintenance of the obligations of the marriage tie, or, "to phrase it otherwise, with loyalty to the other spouse.

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(1) [1938] A. C. 1, 24.

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"I am therefore not surprised, on consideration of the cases of "*Spiers* v. *Hunt* (1) and *Wilson* v. *Carnley* (2), to find that "these decisions are mainly based on the general tendency of "the contracts under consideration to immorality or crime."

Mr. Willes' argument to the effect that this contract is void and cannot be enforced is based on the contention that it is void as against public policy, because it is inconsistent with the maintenance of the obligations of the marriage tie. If I understand what Lord Thankerton is saying aright, he is saying: "After considerable research and going through all the authorities I find that there is no general principle of public policy "that no contract is enforceable which is inconsistent with "maintenance of the obligations of the marriage tie."

I therefore come to this conclusion, respectfully adopting as I do what Lord Thankerton has said, that in a case like the present where the defendant is setting up that the agreement is void because of illegal consideration, and the Court is in entire ignorance as to the circumstances, or whether there was anything immoral in the contract, that in that state of things the defendant has got to satisfy the Court, if there be no general principle of public policy involved, that the particular contract is a contract which is contrary to public policy. As I have said, the rule, under which this issue was set down for hearing, prohibits me from inquiring or hearing any evidence as to the circumstances of the people or what was behind this agreement. I do not shut my eyes, of course, to the fact that, looking at the agreement as set out, it might bear an interpretation which any Court could say showed that the agreement was against public policy. It might mean this, that the defendant was actually paying somebody else's wife 4*l.* a week to separate from her husband, in order that she might live with him in adultery. I am not saying that that is the case at all here. On the other hand, this agreement may mean that the circumstances are somewhat similar to the hypothetical instance which I gave, and it seems to me that in those circumstances, having no evidence before me as to the motive which actuated the parties in making this agreement,

(1) [1908] 1 K. B. 720. (2) [1908] 1 K. B. 729.

I must come to the conclusion that the proper view for me to take is that the defendant has not satisfied me in law that this agreement is void as against public policy.

In those circumstances, I have come to the conclusion that this issue must be decided in favour of the plaintiff, and that the contract is not void as against public policy or based on an illegal consideration.

W. L. L. B.

The defendant appealed. The appeal was heard on November 23, 1937.

R. A. Willes and *G. W. Hignett* for the appellant. The contract as pleaded in para. 2 of the statement of claim is contrary to public policy and void because it is founded upon an illegal consideration—namely, the agreement by the wife to give up the consortium of her husband. An allegation of a contract to give up consortium is the allegation of an illegal contract. Consortium is the right of mutual comfort and society arising from the status of marriage ; it is not the same as cohabitation. Darling J. said in *Rex* v. *Creamer* (1) : "In determining whether a husband and wife "are living together the law has regard to what is called the "consortium of husband and wife, which is a kind of "association only possible between husband and wife. A "husband and wife are living together, not only when they "are residing together in the same house, but also when they "are living in different places, even if they are separated by "the high seas, provided the consortium has not been determined." If it were not for the allegation in the pleading that the wife consented to forego the consortium of her husband, the contract pleaded would not be illegal.

[SLESSER L.J. The pleader has provided a dictionary as to the meaning of " consortium."]

[SCOTT L.J. The word " consortium " is not a term of art, and it has been used very loosely in this pleading.]

The word " consortium " was used as being a highly technical term in the judgments of the House of Lords in

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(1) [1919] 1 K. B. 564, 569.

Fender v. *St. John-Mildmay.* (1) The term does not involve the physical presence of the spouses in the same house.

[SLESSER L.J. It is stated in Lush on Husband and Wife, 3rd ed., p. 4, that a husband has a right to the consortium of his wife, and that a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages, and *Philip* v. *Squire* (2) and *Winsmore* v. *Greenbank* (3) are cited as authorities; but I am not satisfied that this contract was ever made in contemplation of the separation of the plaintiff and her husband.]

This is a contract by the plaintiff to persuade her husband to do certain acts, and when that takes place the plaintiff is to forego the consortium of her husband, and in return she is to receive from the defendant an allowance of 4*l.* a week. The contract only creates an obligation on the defendant to pay the plaintiff an allowance of 4*l.* a week when the plaintiff performs two conditions, one of which is the future abandonment by her of her consortium with her husband. That is illegal. The contract between the parties has been set out in para. 2 of the statement of claim, and the Court ought to give due effect to every part of it. It was pointed out by Lord Haldane L.C. in *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (4) that the Court may and ought to refuse to entertain a claim which is illegal and contrary to public policy, though it will only do so when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiffs' case has been completely presented. [*Pulford* v. *Pulford* (5) was also cited.]

Sir Reginald Coventry K.C. and *W. M. Andrew* for the respondent were not called upon.

GREER L.J. This is an illustration, of which we have had many in this Court, of the futility of ordering an issue, which is dependent upon a literal interpretation of every word in

(1) [1938] A. C. 1.
(2) (1791) 1 Peake N. P. 114.
(3) (1745) Willes 577.
(4) [1914] A. C. 461, 469.
(5) [1923] P. 18.

a pleading, to be decided in advance of the ascertainment of the facts which may be relevant to the consideration of the questions of law. We have been informed that the application was made by Mr. Willes' client and was strongly opposed by the plaintiff. In my judgment the order never ought to have been made; but that does not dispose of the matter because the order has been made, and the learned judge was bound to deal with the order which had been made, and decide the preliminary point which had been argued before him. But as we listened to the very able argument of Mr. Willes I could not help thinking that we were being taken a long way back into the Middle Ages when one had to treat a pleading as if it were an Act of Parliament, and effect had to be given to each word in the paragraph which was being interpreted.

As I understand para. 2 of the statement of claim, it means this: "In or about the month of January, 1936, "the plaintiff and the defendant entered into an agreement "whereby in consideration of the plaintiff persuading her "said husband to go to New Zealand . . . . the defendant "promised to pay to the plaintiff an allowance at the rate of "*4l.* per week until either the defendant should pay the "plaintiff's passage to join her said husband in New Zealand "or the defendant should pay her said husband's passage "back to England." Looked at in that light, apart from the words on which Mr. Willes relies, so far from this being a contract to induce the wife and husband to live separately and apart and to deprive the husband of the consortium of his wife, that is to say, deprive the husband of the comfort and society of his wife and the assistance which he might be entitled to in his household affairs—so far from it being an agreement of that kind, it is an agreement entirely consistent with the two spouses remaining on the very best terms, writing to one another constantly, and not in any sense a contract that was likely to lead to any form of separation or in any way to the loss of the good will which ought to exist between husband and wife.

I regard the words on which so much reliance has been placed by Mr. Willes, "and/or consenting to forego the "consortium of her said husband," as merely the pleader's way of indicating what construction might by some possibility be put upon the agreement which he sets out at length, and not as indicating that the consideration for the promise was the loss of consortium. If I had thought that the consideration for the promise was intended to be the consent of the wife to forego the consortium of her husband, the result of this appeal would have been different; but I do not so read it. For that reason I think the learned judge's conclusion is right, though I think he found difficulties in the way of that conclusion which it was quite unnecessary for him to consider.

For these reasons I think the appeal must be dismissed.

SLESSER L.J. I am of the same opinion.

By para. 5 of the defence in this case the issue is raised "that the contract alleged and relied upon by the plaintiff and "the performance alleged on her part is founded upon an illegal "consideration and contrary to public policy and void." An attempt is being made in the preliminary point of law to decide the issue raised by that plea.

But the first question which has to be considered is, What is the nature of the agreement which it is said is founded upon an illegal consideration? When we come to look at the contract as pleaded and the consideration, we find this, that it is in consideration of the plaintiff persuading her husband to go to New Zealand the defendant is to pay the plaintiff an allowance at the rate of 4*l.* a week until the defendant shall pay the plaintiff's passage to join her husband in New Zealand or the defendant shall pay her husband's passage back to England. Leaving out the debatable words "consenting to forego the consortium of her said husband," that agreement, apart from those words, so far from being an agreement of separation, is an agreement of physical separation for a period, but contemplates that the parties will remain as husband and wife, and actually provides for the financial means for their once more physically living together. There is in this agreement, as I think Mr. Willes is constrained to admit, nothing in the nature of a separation agreement either present or future except the words "consenting to "forego the consortium of her said husband."

As has been pointed out during the argument the word "consortium" is not a word of art; it has been used with increasing frequency of late years. For instance, Lord Atkin in *Fender* v. *St. John-Mildmay* (1) says this: "Not only are the "parties not living together but they are not entitled to "require that conjugal rights should be restored. The "consortium is broken. The petitioning spouse has in effect "said, 'You have in such a degree violated your marriage "'obligations that I am proposing to treat myself as free. "'. . . .'" And in the same case Lord Thankerton, in speaking of separation agreements and the like, says this (2): "Such agreements negative the consortium vitæ, which is "intended not only to preserve the happiness of the spouses "but also to conserve and further the interests of the children, "a very important consideration."

In the present agreement I can see nothing which satisfies the statement of Lord Atkin that the consortium is broken. There is nothing here to assume that the conjugal rights would not be restored or indeed that they have ever been impaired save by such a physical separation as economic necessity or the necessity of a man serving the State may impose upon every husband. I think it would be in the highest degree improper to give to the words of the pleader "to forego the consortium" a meaning which would make that phrase necessarily produce the result that the position was actually that the marital relations should come to an end. I agree with my Lord that those words are no more than the pleader's description of what he has said was the agreement—namely, a persuasion by the wife of her husband to go to New Zealand in consideration of which the defendant promised to pay the plaintiff an allowance at the rate of 4*l.* per week coupled with a provision that the defendant might at a subsequent time pay the plaintiff's passage to join her husband in New Zealand or pay the husband's passage back to England.

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(1) [1938] A. C. 1, 16.

(2) Ibid. 24.

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It follows that while I agree with the conclusion of the learned judge that this preliminary point must be decided in favour of the plaintiff, that this is not an agreement contrary to public policy, I do not think it necessary to enter into his reasons or the elaborate judgment which he has given. He seems to me to have proceeded upon the erroneous assumption that this was a separation agreement; he discusses the question whether the absence of any evidence as to the motives, and the doubt whether the agreement was or was not made in respect of an immediate future separation, would not justify him in coming to the conclusion that he could not say in the absence of that evidence that the agreement was contrary to public policy. I will say nothing about the various cases which he discussed, because in my view the defendant here fails in limine in failing to prove any separation agreement at all.

SCOTT L.J. I agree with the judgments that have been delivered, and desire to add that I do not myself disagree with the judgment of Lewis J. in regard to the reasons which he has advanced, but express no final opinion upon that aspect of the case, because I prefer the reasons given by Greer L.J. and Slesser L.J. But I do particularly desire to join with Greer L.J. in the expression of opinion that the habit of dividing actions and attempting to try preliminary issues is in nine cases out of ten and perhaps ninety-nine cases out of a hundred, most undesirable. It nearly always leads to difficulty and to increased costs. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for defendant, appellant: *Peacock & Goddard, for Shakespeare & Vernon, Birmingham.*

Solicitors for plaintiff, respondent: *Piesse & Sons, for B. D. J. Hayes, Shrewsbury.*

R. F. S.

Applied. Hales v. Bolton Leathers Ld. [1950] 1 K. B. 493

EATON *v.* GEORGE WIMPEY AND COMPANY, LIMITED.

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Nov. 3, 4, 29.

Workmen's Compensation—Industrial disease—Certifying surgeon's certificate—Compensation paid by the employers—Recurrence of disease three years later—Second certificate—Disease "due to the "nature of" the employment—Workman rendered more susceptible by earlier attack—Right to recover compensation against later employers —Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 43, *sub-s.* 1 (*a*) *and* (*c*).

In 1936 a workman was certified by a certifying surgeon to be suffering from the industrial disease of dermatitis and to be disabled from doing his work as from July 15, 1936. An appeal from this certificate was dismissed by the medical referee. For a time his employers paid him compensation, but then desisted, and in answer to the workman's claim for compensation relied on the fact that the workman had been certified to be disabled from dermatitis in 1933, had been paid compensation from 1933–1935, and had never fully recovered from the original attack. The county court judge found on the evidence that as a result of the earlier attack the workman was prone to a recurrence of the disease and therefore that he had never fully recovered. But he made an award of compensation in favour of the workman against the last employer, as that employment was of a nature to which the disease might be due. On appeal:—

Held, that the date of disablement fixed by the second certificate must under s. 43, sub-s. 1 (*a*), of the Workmen's Compensation Act, 1925, be treated as the happening of a notional accident and the workman could therefore recover compensation against his last employers; and that under s. 43, sub-s. 1 (*c*), proviso (i.) and (ii.), those employers had only a right of recourse against any employers who had employed the workman in the twelve months preceding the disablement and whose employment was of a nature to which the disease might be due.

Wilsons & Clyde Coal Co. v. *Flynn* [1930] A. C. 516 and *Blatchford* v. *Staddon & Founds* [1927] A. C. 461 applied. *Richards* v. *Goskar* [1937] A. C. 304 distinguished.

Appeal from an award of Judge Beazley sitting at Edmonton County Court as arbitrator under the Workmen's Compensation Act, 1925.

The applicant, Christopher James Eaton, was in 1933 a workman in the employment of the firm of H. Smith Brothers, of Edmonton, and on July 31, 1933, obtained the certificate of a certifying surgeon that he was suffering from the

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& CO.

industrial disease of dermatitis produced by dust or liquids and was thereby disabled from earning full wages. He was paid compensation by these employers during 1933, 1934 and 1935, and on May 16, 1935, an agreement was come to by which they agreed to pay the lump sum of 260*l.* in full and final settlement and in redemption of all claims for compensation. This agreement was duly recorded. In July, 1935, the workman obtained work as a scaffolder which continued till October, 1935, when he obtained the work of laying cables with the Hornsey Borough Council Electricity Department. While engaged on this work the workman strained himself and was attended by his panel doctor, Dr. Flood. At the hearing of these proceedings Dr. Flood gave evidence that he had then thoroughly examined the workman and found no signs of dermatitis. On May 22, 1936, he obtained work with the respondents, George Wimpey & Co., Ld., of The Grove, Hammersmith, as a jointer laying a 15-inch sewer. His evidence was that he had to handle dry cement for joints to the pipes. On July 15, 1936, he was disabled from doing this work by dermatitis, and on July 24, 1936, obtained the certificate of a certifying surgeon that he was suffering from dermatitis of both forearms and both hands and was thereby disabled from earning full wages at the work at which he had been employed. The certificate fixed the date when the disablement commenced as July 15, 1936. The employers appealed to the medical referee, who on August 11, 1936, dismissed the appeal and certified that the present condition of the workman as ascertained by his examination was that he was suffering from dermatitis produced by dust or liquids and was thereby disabled from earning full wages at the work at which he was employed: "He is not fit for any form of work." Compensation for total incapacity was paid by the employers until on February 24, 1937, they served notice under s. 12 of the Workmen's Compensation Act, 1925, to terminate compensation in ten days.

On April 6, 1937, the workman brought the present arbitration proceedings to recover compensation. On April 30, 1937, the employers put in their answer denying their liability to pay compensation on the grounds (among others) that "if the applicant is incapacitated (which is denied) such "incapacity is due to a recurrence of a disease from which "applicant suffered in 1933, 1934 and 1935 and for which "he has been paid compensation, which payments have been "commuted by a lump sum payment." And the respondents stated that the payments of compensation made since July 15, 1935, were made under a mistake of fact.

The county court judge said that at the hearing of the arbitration it was admitted that the workman was still suffering from dermatitis, but the respondents alleged that the incapacity for earning was not total, while Dr. Flood's view was that he was unfit for work of any kind. He was satisfied by all the medical evidence, including the opinion of the medical assessor who sat with him, that in consequence of the attacks of dermatitis in 1933–1935 the workman was more susceptible to the disease than he had been before those attacks, and that he had therefore not completely recovered from the attack in 1933. In these circumstances it was argued on behalf of the respondents that they were not liable under s. 43 of the Act and reliance was placed on *Richards* v. *Goskar* (1), it being argued that as the attack in July, 1936, was merely a recurrence of the previous attacks of 1933–1935 there was no notional accident in 1936 within s. 43, sub-s. 1 (*c*), as the accident was not due to any employment within twelve months previous to the disease. In his view the decision in *Richards* v. *Goskar* (1) was no authority for the proposition that the applicant was debarred from recovering if the dermatitis from which he now suffered was the same disease as he was suffering from during the period 1933–1935, a disease from which he never wholly recovered. The authority of *Richards* v. *Goskar* (1) and the various cases there referred to, in his view established clearly that when a man had suffered from an industrial disease and the disability arising therefrom temporarily ceased, but recurred at a later date,

(1) [1937] A. C. 304; 29 B. W. C. C. 357.

he was entitled to recover compensation. The date of disablement was conclusively fixed by the certificate of the certifying surgeon—in this case July 15, 1936.

It remained to consider the extent of the incapacity. He was satisfied that in his present condition the workman was unfit for any work. In the result there must be an award for the workman of 30*s*. a week from March 6, 1937, the compensation to continue.

The employers appealed.

The appeal was heard on November 3, 4, 29, 1937.

J. A. Pugh and *R. M. H. Everett* for the appellants. The county court judge having found that the workman had not recovered from the first attack of dermatitis, he ought to look to the first employers for compensation. The fact that they have compounded all compensation by payment of a lump sum is unfortunate for the workman, but this cannot prejudice the appellants.

[Sir Wilfrid Greene M.R. It is an essential part of the county court judge's decision that the date of disablement was fixed by the second certificate.]

That is erroneous in view of the finding that the workman had never fully recovered. The certificate merely fixes the date of the recurrence. There are authorities showing that a second certificate may be disregarded as fixing the date of the accident. The certificate merely calls attention to the renewal of an old trouble and there is no second accident. This case is really covered by *Richards* v. *Goskar* (1) and particularly the judgment of Lord Atkin. In *Wheatley* v. *Lambton, Hetton & Joicey Collieries, Ld.* (2) *Richards* v. *Goskar* (1) was considered, and it was pointed out that a man might resume work after an accident and yet the injury may still remain, and the subsequent incapacity be due to the original accident. That is the contention of the appellants in this case. In *McNicholas* v. *West Leigh Colliery Co.* (3) a declaration of liability was granted to a workman who had

(1) [1937] A. C. 304.
(2) [1937] 2 K. B. 426; 30 B. W. C. C. 171.
(3) (1933) 26 B. W. C. C. 29.

suffered from an industrial disease but was not then incapacitated. Here the incapacity ceased for a time but the disease was latent and recurred.

[They also referred to *McDougall* v. *Summerlee Iron Co.* (1) and *Penrikyber Navigation Colliery Co.* v. *Edwards.* (2)]

Sellars K.C. and *S. Lincoln* for the respondent. In these proceedings the workman proved everything necessary to give him a right to compensation against the appellants under s. 43 of the Workmen's Compensation Act, 1925. The certificate of the certifying surgeon which was affirmed by the medical referee complied with s. 43, and it was established by evidence that the disease was due to the nature of the man's employment at the date of disablement as fixed by the certificate. In these circumstances the county court judge had no alternative but to award compensation. There is no causal relationship to the first attack of dermatitis.

It is not open to the court to go behind the second certificate, which showed that he was disabled by an industrial disease as from July 15, 1936. In view of that certificate the judge could not accept the view that the man had never recovered from the earlier attack: *Wilsons & Clyde Coal Co.* v. *Flynn.* (3)

[SIR WILFRID GREENE M.R. The difficulty of this case in view of *Richards* v. *Goskar* (4) is that a workman may have a disease with a succession of disablements and what is certified is not the date of the disease but the date of disablement.]

Under s. 43, sub-s. 1, cl. (*a*), of the Act the date of the disablement is the date of the notional accident. There is therefore a second accident so certified by the certifying surgeon and the workman's rights arise from that. After the certificate he has to look to the last employer in the preceding twelve months to the nature of whose employment the disease may be due and his right is to recover compensation against him. That employer is liable even though it is an unfair liability, because the Act so provides. That employer has a right of recourse, but only against some one who has employed the

(1) (1927) 20 B. W. C. C. 419, 425.
(2) [1933] A. C. 28.
(3) [1930] A. C. 516.
(4) [1937] A. C. 304.

workman in the twelve months: see s. 43, sub-s. 1, cl. (*c*), provisos (ii.) and (iii.). In *Richards* v. *Goskar* (1) there was no second certificate. The position is wholly different when there has been a second accident in the sense of a second certificate: see *Wilsons & Clyde Coal Co.* v. *Flynn* (2) and *McDougall* v. *Summerlee Iron Co.* (3) Sect. 43 was considered very carefully in *Blatchford* v. *Staddon & Founds.* (4) The obligation is not to show that the disease was contracted in the particular employment, but merely that the employment was of a nature that the disease could be due to it. This case is entirely covered by *Flynn's* case (2) and *McDougall's* case. (3)

J. A. Pugh replied and referred to *Timmins* v. *Brodsworth Main Colliery Co.* (5) and *Durrant* v. *British Fibro Cement Works, Ld.* (6)

Cur. adv. vult.

1937. Nov. 29. MACKINNON L.J. read the judgment of the Court (Sir Wilfrid Greene M.R., Romer and MacKinnon L.JJ.). The respondent entered the employment of the appellants on May 28, 1936. His work was concerned with laying a sewer in wet ground, and he had to handle dry cement when making joints in the pipes. On July 24, 1936, a certifying surgeon, pursuant to s. 43 of the Workmen's Compensation Act, 1925, gave a certificate that the respondent was suffering from dermatitis produced by dust or liquids, and was thereby disabled since July 15, 1936, from earning full wages at the work at which he had been employed—namely, pipe-laying and jointing. The appellants appealed from this certificate to the medical referee. The referee, on August 11, 1936, signed the following certificate: "He is suffering from "dermatitis produced by dust or liquids, and he is thereby "disabled from earning full wages at the work at which he "was employed. He is not fit for any form of work."

The respondent claimed compensation, and that claim was resisted by the appellants. An arbitration accordingly took place on May 13, 1937, before Judge Beazley, sitting with a medical assessor. The appellants proved, or elicited by cross-examination, that in 1933 the respondent was employed by Messrs. Smith Brothers. While so employed he was certified to be suffering from dermatitis from dust or liquids and was paid compensation. It appears from the evidence that his dermatitis so certified was connected with the use of cement in his work for Messrs. Smith. In June, 1935, he compounded any further claim against Messrs. Smith for the sum of 260*l.* The respondent's panel doctor, who gave evidence for him, said that after the attack of 1933 the respondent would be more prone to a further attack on exposure to cement, and agreed that his attack in July, 1936, was probably a recurrence of the 1933 attack.

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(1) [1937] A. C. 304.
(2) [1930] A. C. 516.
(3) 20 B. W. C. C. 419.
(4) [1927] A. C. 461.
(5) [1934] 2 K. B. 361.
(6) (1930) 27 B. W. C. C. 460.

A doctor called for the appellants agreed with this. The medical assessor advised the arbitrator that, in his opinion, the respondent had never completely recovered from the 1933 attack. In his judgment the learned county court judge said: "I am satisfied by all the medical evidence, including "the opinion of the medical assessor, . . . that in con-"sequence of the attacks of dermatitis in 1933–1935, the "applicant was more susceptible to the disease than he had "been before, and that he had, therefore, not completely "recovered from the attack in 1933."

The arbitrator made an award in favour of the workman on the basis of his total unfitness for work. The employers appeal from this decision. The material grounds of their appeal are (1.) that the judge was wrong in law in finding that the disease from which the man was found to be suffering in 1936 was contracted while in the employment of the appellants; and (2.) that he ought to have given effect to the evidence, which he accepted, that the disease was in fact contracted when the man was in the employment of Messrs. Smith in 1933.

Sect. 43, sub-s. 1, of the Act provides that compensation shall be recoverable if a surgeon certifies that the workman is suffering from an industrial disease, and that disease "is "due to the nature of any employment in which the workman "was employed at any time within the twelve months previous "to the date of the disablement." It is essential to observe that the words are " due to the nature of " the employment and that they are not " caused by the employment " or " contracted during the employment." The section does not require that the disease should in fact have been caused by the particular employment within twelve months, nor does it require the workman to prove that it was so caused.

The first subsection of s. 44 is to the same effect. This subsection in fact does not apply to this case, since in the Schedule to the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1925 (St. R. and O. 1929, No. 2), which extends the Third Schedule of the Act of 1925, " dermatitis " produced by dust or liquids " appears in the first column without any process set against it in the second column, but the wording illustrates the scheme of the legislation. If, for example, a man is certified as suffering from " arsenic poisoning " or its sequelae " and within twelve months he has been employed in a process involving " handling of arsenic, etc.," the disease " shall be deemed to have been due to the nature " of that employment, unless the employer proves "—what ? Not " that the disease was not contracted while in his "employment," but " that the disease was not contracted "from the handling of arsenic, etc."—for example, by proving that the man had accidentally drunk some liquor containing arsenic. If he cannot prove that and the disease was contracted from such a process—that is, the nature of the employment, whether in the course of his employ or any other—the condition entitling the man to compensation is fulfilled.

This result seems also clearly indicated by cl. (*c*) of s. 43, sub-s. 1, and its provisos (ii.) and (iii.). Clearly the appellants under (*c*) are " the employer who last employed the workman " during the twelve months before July 15, 1936, " in the "employment to the nature of which the disease was due." If he had within those twelve months been in the employment of Messrs. Smith it would have been open to the appellants to prove that the disease was in fact contracted while he was in Smiths' employment, and the appellants under proviso (ii.), having joined Smiths as parties to the arbitration, could have shifted the burden of paying the compensation on to them. Similarly, if the disease were of a nature to be contracted by a gradual process, they might have claimed contribution from Smiths under proviso (iii.). The appellants here sought to prove, and in fact succeeded in proving, that the man contracted the disease when in the employment of Smiths. But the relevance, if not the admissibility, of such evidence could only arise if they were seeking to take advantage of either proviso (ii.) or proviso (iii.). The man's employment with Smiths having ceased more than twelve months before July 15, 1936, proviso (ii.) could not apply, and Smiths could not be joined as parties, and, if the proviso does not apply, the enactment of cl. (*c*) is conclusive —the compensation is " recoverable from " the appellants as "the employers who last employed the workman during the "said twelve months " before July 15, 1936, " in the employ-"ment to the nature of which the disease was due."

In the last paragraph we have said that if within the last twelve months he had been in the employment of Messrs. Smiths, the appellants could have availed themselves of proviso (ii.). That the words " during the said twelve months " must be read as qualifying the words " was in the employment "of some other employer " in proviso (ii.) seems to have been decided by the House of Lords in *Blatchford* v. *Staddon & Founds*. (1) Lord Sumner, referring to the provisos, said: "Provisos are finally added to mitigate the hardship of "exacting compensation from an employer whose employment "may not be shown to have had and may not actually have "had anything to do with the onset or the progress of the "disease or with the ultimate disablement of the workman. "He is to have the opportunity of recovering over part or "even the whole of the compensation from others, whose "employment of the workman during the twelve months in "question in processes from the nature of which such a

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(1) [1927] A. C. 461.

"disease arises may have been its source in fact." Lord Wrenbury says: "Must this other employer have been an "employer during the statutory twelve months? It seems "to me that he must, for otherwise no liability has by anything "which precedes been created in him." That this is the correct view, if reason be required other than the fact that the House of Lords has said it is, may surely be derived from the words in para. (i.) of the provisos, requiring the workman to supply the names of other employers "during the said "twelve months," and the express reference to "other "employers who during the said twelve months," etc., in para. (iii.) of the provisos.

It is quite true that this result may appear to work hardship on the appellants or their insurers. They have proved that the disease was contracted when the man was employed by Smiths. If that employment had been within twelve months, they could have handed on the burden of compensation to Smiths under the proviso, but as the employment under Smiths was more than twelve months before, and the disease contracted in that employment was therefore of a long standing, possibly of a chronic character, the appellants cannot shift the burden and must bear it themselves. We can only suppose that the Legislature considered that prudent employers could be sufficiently protected against any such hardship by having recourse to the procedure provided under cl. (*b*) in s. 43.

There is another way in which, if the Act allowed it, the appellants might seek to rely upon the evidence of what happened to the respondent when in Smiths' employ and its continuing effect. They might seek to say, "The notional "accident did not happen to this man on July 15, 1936, for "in fact, as we can prove, he was disabled years ago when in "the employment of Smiths." But the Act does not permit such a contention, for by sub-s. 2 of s. 43, "the date of "disablement shall be such date as the certifying surgeon "certifies as the date on which the disablement commenced," that is, in this case, July 15, 1936. By cl. (*a*) of sub-s. 1 of s. 43, "The disablement . . . . shall be treated as the "happening of the accident." Upon this aspect of the case, as well as on the matters we have previously considered, the decision of the House of Lords in *Wilsons & Clyde Coal Co.* v. *Flynn* (1) is directly in point and is, of course, conclusively binding upon us. As Lord Hailsham said in that case: "The language of the Statute is quite plain and "unequivocal, and in my judgment it is our manifest duty "to give to the words used their plain meaning."

Another case, which is very much in point and supports the same conclusion, is the decision of the House of Lords in *Blatchford* v. *Staddon & Founds.* (2) The House was there concerned to construe s. 8 of the Act of 1906, but its words have been re-enacted in s. 43 of the Act of 1925. Lord Sumner says: "In construing the Act effect must be given "to the words 'to the nature of.' Their meaning cannot "be the same as if the section had simply said 'is due to' "any employment. I think they are inserted because this "part of the section is not concerned directly with something "arising out of the particular service of the particular employer "sued, but with results which are incidental to the class of "employment, in which the workman has served several "employers."

Counsel for the appellants cited to us a number of cases which appear to have only an indirect, if any, bearing upon the problem involved in this case. Two of them, indeed, *Timmins* v. *Brodsworth Main Colliery Co.* (3) and *Durrant* v. *British Fibro Cement Works, Ld.* (4), have been held by the House of Lords, in *Richards* v. *Goskar* (5) to have been incorrectly decided. They also relied upon that decision in the House of Lords in *Richards* v. *Goskar.* (5) It appears to us to have little relevance to this case. There a workman who was certified to be suffering from an industrial disease in 1932 was paid compensation till he resumed work in 1933, and was then paid full wages till the colliery closed later in 1933. He thereupon claimed to have his compensation again and it was found as a fact that he still suffered from the disease certified in 1932. The House of Lords held that he was entitled to recover. Lord Atkin cited with approval the words of Romer L.J. in *McNicholas* v. *West Leigh Colliery Co.* (1): "It is . . . . the disease that the man is "entitled to treat as the injury and not the disablement, from "which it follows that he does not cease to be entitled to treat "himself as having sustained injury by accident merely "because his disablement ceases temporarily." That case might have some bearing on the present case if the workman, Eaton, had not compromised his claim for compensation against Smiths, and, on proof that he was in 1936 still suffering from the dermatitis certified in 1933, had claimed further compensation from them. But we cannot see that the case has any bearing on the question whether, on the facts of this case, he can claim compensation from the appellants.

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(1) [1930] A. C. 516.

(2) [1927] A. C. 461.

(3) [1934] 2 K. B. 361.

(4) 27 B. W. C. C. 460.

(5) [1937] A. C. 304; 29 B. W. C. C. 357.

It does not seem profitable further to discuss the authorities cited for the appellants. The case of *Wilsons & Clyde Coal Co.* v. *Flynn* (2) is a decision of the House of Lords that is directly in point, and the principle of a second decision of the House of Lords in *Blatchford* v. *Staddon & Founds* (3) is almost as conclusive. It is not profitable to consider other cases which may be said, indirectly, not to be wholly consistent with those cases. In them the House has spoken quite clearly, and we are bound by their decisions. It is needless to add that we entirely agree with them.

This appeal, therefore, must be dismissed with costs.

Appeal dismissed.

Leave was granted to appeal to the House of Lords.

Solicitors: *James Turner & Son*; *Durnford, Son & Bartle.*

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(1) (1933) 26 B. W. C. C. 29, 44.
(2) [1930] A. C. 516.
(3) [1927] A. C. 461.

H. C. G.

CAREY *v.* OCEAN COAL COMPANY, LIMITED, AND OTHERS.

1937
Oct. 25, 26.

Coal mine—Exposed and dangerous machinery—Duty to keep securely fenced—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 55.

Among the machinery used in a coal mine to which the Coal Mines Act, 1911, applied was a mechanical belt conveyor. The rollers at the end were contained in a cage which purported to shield them at the sides, but there was no fencing in the front. A temporary stoppage occurred and a workman got on to the lower level of the belt and crawled along to the rollers, presumably for the purpose of freeing them, or ascertaining the cause of the stoppage. The machine began to move, and the workman was killed.

The justices dismissed informations against the proprietors, agent and manager of the mine for failing to keep exposed and dangerous machinery securely fenced. They were of opinion that the workman, when he met with the accident, "was acting in "a wrong and extraordinary manner," and that, if he wished to get at the rollers, he could and should have got at them through the apertures in the sides of the cage, and that the machinery was undoubtedly dangerous, but, on the evidence before them, it was not exposed:—

Held, (1.) that it is quite irrelevant in a prosecution under s. 55 of the Coal Mines Act, 1911, or s. 10 of the Factory and Workshop Act, 1901, that the workman is acting improperly, since the Acts are designed to protect the careless workman against himself as much as the careful workman;

(2.) that "exposed" means "at all exposed," and it was no answer to say that the machinery was exposed only to the man who had to work or repair it, and who was the person most in need of protection;

(3.) that machinery can hardly be "dangerous" without being "exposed";

(4.) that the duty imposed by s. 55 of the Coal Mines Act, 1911, is even higher than that imposed by s. 10 of the Factory and Workshop Act, 1901, since s. 55 does not contain the alternative in s. 10, sub-s. 1 (*c*), or the exception in s. 10, sub-s. 1 (*d*) (which, in any case, is available only to a person who has discharged the primary duty to fence).

Wing v. *Soar* (post, p. 379) applied.

Todrick v. *Halliday* (1928 S. C. (J.) 61) distinguished and not approved.

CASE stated by Merthyr Tydfil justices.

Informations were preferred by the appellant, Joseph McLeod Carey, a divisional inspector of mines under the

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Coal Mines Act, 1911, against the Ocean Coal Company, Ld., the proprietors of the Deep Navigation Colliery, Treharris, and against Benjamin Rees, the agent, and David George Richards, the manager respectively of the said mine, alleging that between October 18 and 22, 1936, they unlawfully contravened s. 55 of the Act (1), in that an exposed and dangerous part of machinery used in and about the mine was not kept securely fenced. The informations were dismissed.

The following facts were proved or admitted: The appellant was His Majesty's divisional inspector of mines for the county borough of Merthyr Tydfil. The respondents were at all material times respectively the owners, agent and manager of a coal mine to which the Coal Mines Act, 1911, applied, known as the Deep Navigation Colliery, Treharris, in the county borough of Merthyr Tydfil.

Between October 18 and 22, 1936, there was installed and used in the mine a mechanically driven belt conveyor, the maximum speed of which when in motion would not exceed 1⅓ miles an hour. The evidence was that the belt conveyor travelled in an anti-clockwise direction carrying the coal on the bottom portion of the belt, which was 4 inches from the floor. The distance between the top and bottom portions of the belt was 3 feet. The rollers of the belt conveyor were enclosed in a cage which purported to shield them in such a manner as to prevent their being an object of danger to those employed about the conveyor. At each side of the cage was a D-shaped aperture which would enable the human arm to be put through for the purpose of oiling the rollers when necessary. In front of the rollers and between the top and bottom parts of the belt there was no fencing, and the justices were of opinion that such fencing in that part of the belt conveyor was not required, inasmuch as all the requisite access to the rollers could be obtained through the apertures, which were 2 feet 7 inches deep by 12 inches wide at the widest part, tapering downwards to a minimum width of 4 inches.

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(1) The Coal Mines Act, 1911, s. 55: "Every fly-wheel and all "exposed and dangerous parts of "the machinery used in or about "the mine shall be kept securely "fenced."

The Factory and Workshop Act, 1901, s. 10, sub-s. 1: ". . . . "(*c*) All dangerous parts of the "machinery and every part of the "mill gearing must either be "securely fenced, or be in such "position or of such construction "as to be equally safe to every "person employed or working in "the factory as it would be if it "were securely fenced; and (*d*) All "fencing must be constantly "maintained in an efficient state "while the parts required to be "fenced are in motion or use, "except where they are under "repair or under examination in "connexion with repair, or are "necessarily exposed for the purpose of cleaning or lubricating "or for altering the gearing or "arrangements of the parts of the "machine."

On October 19, 1936, at a time when the belt conveyor had stopped, one Titus Davies, a fitter employed in connection therewith, got on to the bottom portion of the belt, and began to crawl along it on his hands and knees towards the rollers. He was apparently attempting to discover the cause of the stoppage. The belt, which was driven by an engine and controlled by an operator some 50 yards away, commenced to move. A shout was heard, the belt was stopped, and Davies was found dead with his head and arm fast between the top rollers of the bottom set at the return end.

On behalf of the appellant it was contended that the return end of the conveyor was an exposed and dangerous part of the machinery and was not securely fenced, and that the respondents were guilty of the offence charged.

Without hearing the respondents the justices were of opinion that Titus Davies when he met with the accident was acting in a wrong and extraordinary manner, and that if he wished to get at the rollers he could and should have got at them through the D-shaped apertures, that the machinery in question was undoubtedly dangerous, but was not, in their view, "exposed" within the meaning of the Act. They accordingly dismissed the informations.

Valentine Holmes for the appellant. There was no evidence on which the justices could find that the machinery was not exposed. Their finding of fact must be based on a misconstruction of the word "exposed" in s. 55. They have interpreted it as meaning "exposed to a man who is doing his work

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"without negligence and in accordance with the regulations," but the word is used in the section without any qualification.

Maxwell Fyfe K.C. and *Milmo* for the respondents. The word " exposed " essentially involves a question of fact. It must mean something other than " dangerous " or its presence would be otiose. The definition of " expose " in the Oxford English Dictionary is " place in an unsheltered or unprotected "position." Something other than the lack of the protection of fencing must be connoted.

Todrick v. *Halliday* (1) is an authority for the proposition that a mine-owner is not obliged to guard absolutely against an extraordinary occurrence. There was evidence that the situation in this case was extraordinary, and such a situation should not be taken as a test whether the machinery was exposed or not. Moreover a distinction should be drawn between the case of a person who uses the machine while it is working and the case of a person who only goes to the machine to repair it.

The cases under the Factory Act are not applicable, because the word " exposed " does not appear in s. 10 of that Act. In *Wing* v. *Soar* (2) the machinery was admittedly exposed and the meaning of that word was not considered. But the addition of the word " exposed "—" exposed and dangerous "parts of the machinery "—seems to impose a less onerous obligation on the mine-owner than is imposed on the factory occupier under s. 10.

" Exposed " means placed in such an unsheltered position that persons doing the ordinary work of the mine are likely to come in contact with it. The test cannot be whether any person approaching the machine for the purpose of repairing it is likely to come in contact with it, for every repairer must necessarily come in contact with the object of his repair.

The provisions of s. 55 do not apply to extraordinary and exceptional circumstances: *Todrick* v. *Halliday*. (1) The test is whether in normal circumstances the rollers could properly be regarded as exposed. In normal circumstances, when the machine was working properly, they were not

(1) 1928 S. C. (J.) 61. (2) (1926) Unreported ; see post, p. 379.

exposed, for the movement of the belt would make approach along the belt impossible. In the present case the circumstances were abnormal not only from the actions of the workman, but because (*a*) there was a breakdown or stoppage; (*b*) the machine happened to be re-started at the very instant when Davies had his hand on the rollers; and (*c*) had it been re-started at any other time Davies could never have got where he did, as the movement of the belt would have carried him away from the rollers.

Whether the state of things was extraordinary and whether the rollers were exposed are questions of fact.

In any event, since the justices stopped the case, the respondents are entitled, if the Court is against them on the main question, to an opportunity of raising defences under s. 75 of the Act, and the owners' agent also under s. 102, sub-s. 1.

LORD HEWART C.J. This is a case stated by justices for the county borough of Merthyr Tydfil. The case arises out of an information preferred by the appellant, who is a divisional inspector of mines under the Coal Mines Act, 1911, against the respondents, who are colliery proprietors, for that they were guilty of an offence under the Coal Mines Act, 1911, in that they at a certain colliery between days which are named, they being the owners of a mine known as the Deep Navigation Colliery, "unlawfully did contravene s. 55 of "the said Act, in that all exposed and dangerous parts of "machinery used in or about the said mine, to wit, the return "end of a belt conveyor of the Huwood type situate in that "part of the said mine known as Tom Sam's District in the "Four Feet Seam was not kept securely fenced," contrary to the provisions of the statute. That information was heard at the same time with two similar informations against the agent and manager respectively of the mine. In the result, the justices dismissed the informations, and the question is whether they came to a correct determination and decision in point of law.

Sect. 55 of the Coal Mines Act, 1911, is an extremely brief, and, one would have thought, perfectly intelligible section.

It clearly shows that two kinds of machinery must be kept securely fenced, first of all, every fly-wheel, and, secondly, all exposed and dangerous parts of machinery used in or about the mine. Here there was no question about any fly-wheel. What was said was that certain exposed and dangerous parts of the machinery in question were not kept securely fenced. [His Lordship read the facts set out in the case stated.]

The justices interpose in what purports to be a statement of the facts proved or admitted: "We were of opinion that "such fencing in this part of the belt conveyor was not "required inasmuch as all the requisite access to the rollers could "be obtained through the apertures." That may be merely a casual blemish on the face of this case. They go on to make further findings of fact, and in that state of the evidence they say that it was contended on behalf of the appellant that the return end of the belt conveyor was an exposed and dangerous part of the machinery and was not securely fenced and that the respondents were guilty of the offence charged. The justices, however, came to an opinion which they have expressed in these words: "We were of the opinion that the "said Titus Davies when he met with the said accident was "acting in a wrong and extraordinary manner and that if he "wished to get at the rollers he could and should have got "at them through the D-shaped apertures, that the machinery "in question was undoubtedly dangerous but was not in our "view exposed within the meaning of the Act upon the "evidence adduced before us. We accordingly dismissed the "said information."

I am anxious to refrain from the use of any epithets whatsoever if it is possible; but that is, to say the least of it, a remarkable expression of opinion. It consists manifestly of three parts. The justices were clearly of the opinion that the machinery which was referred to was dangerous, because they say: "We were of the opinion . . . . that the machinery in "question was undoubtedly dangerous," but they dismissed the information. Why? Apparently for two reasons, and perhaps the order of importance, as it seemed to them, was the order which they have observed in expressing their opinion. They dismissed the information, first, because Davies "when he met with the accident was acting in a "wrong and extraordinary manner, and if he wished to get "at the rollers he could and should have got at them through "the D-shaped apertures"—that seems to be the foundation of their finding—and, secondly, they add that in their opinion the machinery in question, although dangerous, was not exposed within the meaning of the Act. Well, there is hardly a point there which has not been dealt with by this Court many a time in the course of the past twenty years, sometimes directly under s. 55 of the Coal Mines Act, 1911, as in the case of *Wing* v. *Soar* (1) in October, 1926, and sometimes in a series of cases under s. 10 of the Factory and Workshop Act, 1901. It is quite true that s. 55 of the Coal Mines Act, 1911, is not in exactly the same terms as s. 10 of the Factory and Workshop Act, 1901; but the provisions of the Coal Mines Act, 1911, are a fortiori upon the provisions of the Factory and Workshop Act, 1901. In the unqualified language of s. 55 of the Coal Mines Act, 1911, there are no such savings or exceptions as are to be found in the Factory and Workshop Act, 1901. It is therefore quite idle to say that the information was dismissed because the workman was acting in a wrong and extraordinary manner and, if he wished, he could have got at the rollers otherwise.

It ought to be unnecessary at this time of day to repeat the elementary fact that legislation of this kind is not designed only for the protection of workmen who act in a perfectly right and ordinary manner, observing every possible precaution. Workmen very often have to be protected against themselves, not, that is to say, against the results of their own deliberate mischief, but against the consequences of doing what they have to do in a way which either hurry or laziness or some other consideration may present to their minds as being at the moment the most convenient way of doing it. The section, therefore, provides that if a part of the machinery is exposed and is dangerous, it must be securely fenced. Stress was laid in the argument for the respondents upon the word "kept," and with reference to that word our attention was invited to the Scottish case of *Todrick* v. *Halliday*. (1) That case on the facts was removed from the facts of this case as the poles are asunder. There something which was not ordinarily used was used because of the extraordinary emergency in the workings of a general breakdown, and it was said that the particular part of the machinery which was not then fenced could hardly be a part of the machinery to which this section was applicable, because it was inconceivable that a fence should be kept there and that for such an occasional and rare and unexpected event as a general breakdown, followed by the rare user of that part of the machinery, it would be wrong to think that this section applied. I am far from expressing approval of that statement myself. I treat it with respect, but in any event it is not in the least degree binding upon this Court, and in my opinion so utterly different are the facts there that it throws no light upon the present case. There are, however, passages in the opening part of the judgment of Lord Alness which show how impossible the position of the respondents is in this case.

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(1) Post, p. 379.

Next it was said that this part of the machinery, although undoubtedly dangerous per se, was not exposed; and a little amplification of the argument proceeded to develop this proposition that in this section "exposed" means exposed to persons in general: it is not enough, in order to invite the safeguards provided by the section, that the particular machinery is exposed to those employees who most frequently are about it and use it. There is a degree of paradox there which amounts to the grotesque. I cannot conceive anything more completely futile than a statutory provision for the protection of the life and limb of workmen which should except from and entirely leave out of its protecting provisions the particular class of workmen most likely to come, and to come most frequently, near to or in contact with the machinery referred to. That all are to be protected, but those are not

(1) 1928 S. C. (J.) 61.

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to be protected whose function it is to work near to the machinery seems to me to be a paradox of a high order, a kind of paradox which a man employs in defending a controversial position that is perceived to be unsustainable. There is no magic about the word "exposed," and I am not going to define it. The word speaks for itself. I find it a little difficult, among the many difficulties in fathoming the mind behind this judgment, to understand how a part of the machinery can be at one and the same time dangerous but not exposed—unless the justices are drawing a distinction between what may be considered dangerous in the abstract or universally without reference to any particular person or time or place and dangerous as regards some particular individual. The justices in this case have found that this part of the machinery was dangerous to Titus Davies, and they have found it was not exposed. If it was not exposed, how in the world did Davies get his head and his arm into it? It is not suggested that he put his head and arm into the rollers in a spirit of mischief. When the accident happened he was moving along the belt and he was moving along it in the direction of the rollers, for the perfectly legitimate purpose of ascertaining, if he could, the cause of the momentary stoppage; but it is quite obvious that, if there had been a protecting shield between him and the rollers, his head and his arm could not have got into the rollers. I cannot understand how it can be said that that part of the machinery was not exposed. The argument really developed into this, that although the machinery was exposed to a person in such a position as that into which Titus Davies got, it was not exposed to the person passing by its side in the colliery. I see no such limitation upon these words. "Exposed" is not limited in its effect; "exposed" means "at all exposed" in the mine. If the machinery is dangerous, and if it is machinery which is being used in the mine, it must not be exposed and unfenced. Above all, one would think it must not be so exposed to the persons whose work may take them into close contact with it.

But it was said—I do not know whether it was said to the justices below, but it has been said with great emphasis here—that, even if the rollers in the places referred to had been securely fenced, nevertheless for such a definite act as oiling or repairing or effectively tracing a stoppage, it might have been necessary to remove, for a moment, whatever fence had been there. Our attention was directed to s. 10 of the Factory and Workshop Act, 1901. Now it is quite true that s. 10 of the Factory and Workshop Act, 1901, after the universal and unequivocal provision that all dangerous parts of machinery and every part of the mill gearing must either be securely fenced or be equally safe, fenced or unfenced, goes on to make an exceptional provision as to what may be done where proper fencing has been provided. Sect. 10, sub-s. 1 (*d*), is a beneficial exception relating to what may be done in those particular and limited circumstances, where the fencing provided for by the Act has been duly carried out. There is no such provision in the Coal Mines Act, 1911, and even if there had been, it could never have been turned to the account of defendants who had omitted to do the fencing. How can any human being more or less responsible for the life and limb of another human being be heard to say: "It is quite true I did not provide a fence, but what "does it matter? If I had provided a fence, then at a moment "of oiling or repairing, the fence might have had to be "removed." Such an argument is simply not open to persons who have failed in the primary statutory duty of providing secure fencing. I am very far from suggesting that, in order to oil particular machinery, or to oil this machinery, a fence, if provided, might have had to be removed, and I am very far from suggesting that the ingenuity of mankind could not devise a secure fence which might permit oiling without removal of the fence; but those questions simply do not arise when the offenders, at the very threshold, are found to be in delinquency. They have provided no fence and, therefore, I am not concerned to consider the question whether, if they had, the fence might not have had to be taken off. This Court has held again and again and again ad nauseam during the last score of years that it is no answer at all on the part

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of employers who have refrained from doing the requisite fencing, to say: "Well, but if we had provided it, the fencing "might have had to be taken away for oiling."

Mr. Maxwell Fyfe's argument in this case, ingenious as it is, and exhaustive as it is, involves, if it is to prevail, that in all kinds of ways this clear, concise and imperative section in this statute shall be re-written and embroidered with exceptions and provisos. As it stands, so far as it relates to dangerous parts of machinery, it says that all exposed and dangerous parts of machinery used in and about the mine shall be kept securely fenced. If Mr. Maxwell Fyfe's very clever argument were to prevail, the section would have to be re-written in full in some such way as this: "All dangerous "parts of machinery, if exposed to employees or workmen "other than those most commonly near or in contact with "them, but not otherwise, shall be kept, in the normal circum-"stances of the working, securely fenced in the interests of "workmen who do nothing that they should not do and never "behave in an extraordinary way." Then I think he would add a proviso: "Provided that no proceedings shall be taken "under this section unless it appears that an inspector of "mines has given notice in writing before the happening of "the accident that the fencing which was not provided ought "to have been provided." That might be very useful from the point of view of some colliery owners, but it would be death and destruction to this statute, which has been described more than once as "the charter of the man who has to work "underground." I do not attempt to re-write the section.

Finally, we are told that it is a question of fact whether the part of the machinery is exposed and dangerous. It is undoubtedly a question of fact, and a question of fact to be decided by reasonable minds upon the available evidence. Nowhere in this case is there a shred or tittle of evidence upon which any reasonable mind, in my humble opinion, could find that this machinery was not exposed. Mr. Maxwell Fyfe feels the pinch of it himself. He says: "True it was exposed "if a man was working in or near it, as this fitter was. "'Exposed' in this section does not mean that. It means "exposed so as to be a danger to employees in general who "were not called upon to work in or near it." In other words, the protection is to be most useful for those who do not want it, and of no use at all for those who want it most. In my opinion, the justices here have erred in point of law. They have, indeed, found, and found correctly, upon the evidence, that the machinery in question was undoubtedly dangerous; but they have directed their minds to something quite irrelevant when they dismiss the information upon the ground that the workman met with the accident when he was acting in a wrong and extraordinary manner and might have done otherwise, and, when they find that this part of the machinery was not exposed, they come to a conclusion for which no support is offered by the evidence in the case. I think, therefore, that the answer to the question (and the only question) asked—"Whether the justices came to a correct "determination and decision in point of law?" must manifestly be "No."

There in the ordinary way would be the end of the case; but it is said here that the justices not only struck badly, but struck too soon, and their too hasty intervention had the effect of preventing the respondents from developing defences which, if the opportunity had offered, they might have sought to develop. It is suggested, faintly, perhaps, that partly under s. 75 of the statute and partly under s. 102, sub-s. 1, of the statute, there might conceivably be some defence or excuse open to one or more of these respondents. I cannot for the life of me imagine what it can be, but that is neither here nor there. If we are told, and we must assume we are seriously told, that there is, or there may be, a desire on the part of some, or all, of the respondents to seek to put forward a statutory defence and to establish it by means of evidence, it would be wrong to deny them that opportunity. Therefore, all I am saying for the moment is that, in my opinion, the conclusion at which the justices have arrived is untenable in point of law, and if they desire to hear, or if the respondents desire that they should hear, further evidence by way of exculpation upon a defence which would utterly contradict all the argument laid before us in this case, I do not think it would be right to prevent them having that opportunity.

Subject to that, I think this appeal ought to be allowed with costs.

HUMPHREYS J. Having heard the judgment of my Lord in this case, I only desire to say that I agree with every word of it.

DU PARCQ J. I am of the same opinion and wish to add only a few words. In this case the learned stipendiary and the other justices found, no doubt correctly, that this machine was dangerous. They had had cited to them the case of *Hindle* v. *Birtwistle* (1), where Wills J. said: "It seems to "me that machinery or parts of machinery is and are dangerous if in the ordinary course of human affairs danger "may be reasonably anticipated from the use of them without "protection," adding, a little later: "In considering whether "machinery is dangerous, the contingency of carelessness on "the part of the workman in charge of it, and the frequency "with which that contingency is likely to arise, are matters "that must be taken into consideration." I assume that the justices approached the question whether this machinery was dangerous or not with those observations in their mind, and they found that it was. So that, taking into account the possibility of carelessness on the part of the workman, they found that danger might be reasonably anticipated from its use. Danger to whom? Clearly danger to those whose duties might compel them to do some work upon it, much more than to any other persons in the mine. I agree respectfully that it seems most paradoxical to say that when one looks at the word "exposed," one must treat it as meaning only exposed quoad people who have no concern with that particular machinery. In elaborating his argument, Mr. Maxwell Fyfe, if I understood him, said that where you are concerned with a fitter whose duty it would be, for instance, to lubricate and repair machinery, the machinery was not exposed if it was only exposed so far as he was concerned in the ordinary course. I think it is instructive, having regard to that argument, to look perhaps a little more closely than the magistrates did at the unreported case of *Wing* v. *Soar*. (1) In that case the man who had been killed was employed as a fitter, and he was killed when he was oiling the shafting in question in that case. That shafting was placed 13 feet 8 inches above a boarded platform which, in its turn, was 11 feet above the level of the ground, and was approached by a ladder. It was when the man who was killed was upon the ladder doing his ordinary work of oiling that his clothes became entangled in the shafting and he suffered the injuries from which he died. In that case the justices had found upon the facts, wrongly as this Court held, that the machinery was not dangerous. In his judgment in that case, my Lord said this: "In this case it seems to me that there are two "observations to be made. The first is that on the facts as "stated it would be startling if any person could come to "the conclusion that this shafting, placed where it was and "oiled as it was, was anything other than exposed and "dangerous. It is not even suggested that it was not "exposed." In the present case the justices appear to have realized that if they were to follow the decision in *Wing* v. *Soar* (1) they could not find that this machinery was anything but dangerous; but they have taken a somewhat desperate refuge in the finding that, though dangerous, it was not exposed. The finding is so wholly inconsistent, I do not say with the express decision in *Wing* v. *Soar* (1), but with what may be a dictum in *Wing* v. *Soar* (1), and with the conclusion that must be drawn, as it seems to me, by any process of accurate reasoning from the decision in *Wing* v. *Soar* (1) that one feels that the justices ought to have realized, when once in this case they found that the machinery was dangerous, it was quite impossible to hold that it was anything but exposed.

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(1) [1897] 1 Q. B. 192, 195.

I only wish to say this further. It appears to me that the case of *Wing* v. *Soar* (1) might be, and ought to be, of great assistance to justices who read it, and would be of assistance also to those who have to advise the owners of mines on these matters. Speaking for myself, I regret that that case has not been reported, and, although the case is eleven years old now, I hope it may not be too late to remedy the omission and to have it reported. (1) I agree with the order proposed by my Lord.

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(1) Post, p. 379.

Appeal allowed. Case remitted.

Solicitor for appellant: *The Solicitor, Board of Trade.*

Solicitors for respondents: *Furniss, Stephen & Co., for A. J. Prosser, Cardiff.*

(1) In accordance with his Lordship's suggestion a report of *Wing* v. *Soar* is appended to the present case.

J. W. H.

NOTE.

[KING'S BENCH DIVISION.]

October 15, 1926.

WING *v.* SOAR.

Case stated by justices for the West Riding of Yorkshire.

An information preferred by the appellant James Edward Wing, a solicitor, on behalf of an inspector of mines against Thomas Levi Soar, manager of the Barnborough Main Colliery, Barnborough, near Doncaster, in respect of an offence alleged to have been committed contrary to s. 55 of the Coal Mines Act, 1911, in that the respondent failed to see that every fly-wheel and all exposed and dangerous parts of the machinery used in and about the mine were kept securely fenced, was dismissed by the justices.

The case stated is adequately set out in the judgments.

Giveen for the appellant.

Sir Henry Maddocks K.C. and *John Neal* for the respondents.

LORD HEWART C.J. This is a case stated by justices arising out of the hearing of an information laid by the present appellant against the respondent whereby an offence was alleged to have been committed contrary to s. 55 of the Coal Mines Act, 1911. The allegation was that the respondent then being the manager of a particular colliery near Doncaster failed to see that every fly-wheel and all exposed and dangerous parts of the machinery used in or about the mine were kept securely fenced. The justices having heard the information, and having heard the evidence, dismissed the information, and the question for this Court is whether they came to a correct determination in point of law.

The facts proved or admitted are set out at some length in the case. It is not necessary to read again the whole of those facts, but it may be well to refer to some of them. It is found as a fact that a man named Joseph Quinn, twenty-five years of age, was employed as a fitter in the mine under the respondent, and at the material time was engaged in the act of greasing certain shafting which was fixed to the exterior of the particular building at the colliery. That shafting was over 33 feet in length, it was 3½ inches in diameter, and was supported by four pedestals and four brackets. It was 13 feet 8 inches above a boarded platform which in its turn was 11 feet above the level of the ground. Between the wall and the shafting there was a clearance of just over a foot—13 inches—and the speed of the shaft was seventy revolutions a minute.

What was the method in fact observed for the lubrication of that shafting? The practice was that the man who was to put in the grease went up a ladder to reach the pedestal supporting this shafting where the cups were to be greased, and that ladder was placed in turn against each of the four brackets just below the pedestal. That operation was regularly and at short intervals repeated.

On October 20, 1925, while Joseph Quinn was engaged at the top of the ladder in greasing the cups his clothing evidently became entangled and he was carried round the shafting and instantly killed. The case further finds that that man had been employed in greasing the machinery for a period of two years and that he had daily used that ladder to reach the pedestals of the shafting for greasing or oiling, which took place two or three times during the whole of the two shifts. After the events of October 20 Joseph Quinn was found hanging head downwards from the shaft stripped of his clothing. He was apparently dead, the ladder was fixed sideways on to the shafting, and a little later his clothing was found wrapped round the shafting six inches from the pedestal which he had been greasing. Those are the findings of fact relating to what was being done and to the consequence of what was done.

The findings of fact are by no means limited to matters of that kind. The justices are also careful to point out that shafting of this nature, situated as this was, is hardly ever fenced, that many miles of it exist unfenced in various mines and factories in different parts of the country, that this very shafting had been in its present position for two and a half years, that warnings are posted at this very colliery warning persons in charge of machinery against the danger of having loose clothing, and finally that the machinery could have been stopped by Quinn while he was in the act of greasing if he had wished to stop it. Such is the importance which the justices evidently attached to that last finding of fact that they repeat it, in the second sentence of what is set out as their judgment. They say there: "We considered "in view of all the circumstances and found as a fact that the shafting "was not dangerous. We further found as a fact that the deceased "man had the shafting under his control and could have stopped it "while greasing the cups."

This particular prosecution took place under the Coal Mines Act, 1911, s. 55. That is a section expressed in very concise and clear terms, which are as follows: "Every fly-wheel and all exposed and "dangerous parts of the machinery used in or about the mine shall "be kept securely fenced." There are no exceptions and there are no limitations. The duty is imperative and universal.

It happens that most of the cases which appear to have a bearing on this matter have been decided not under that section but under s. 10 of the Factory and Workshop Act, 1901. Under that section there are undoubtedly certain limitations and exceptions, and I think, therefore, that what has been said in cases of that kind may be taken to apply a fortiori to a case where the question turns on s. 55 of the Coal Mines Act, 1911. In *Hindle* v. *Birtwistle* (1), a case which was heard in 1896, Wills J. said: "It seems to me that machinery or "parts of machinery is and are dangerous if in the ordinary course "of human affairs danger may be reasonably anticipated from the use "of them without protection."

Then a little later the learned judge added: "In considering "whether machinery is dangerous, the contingency of carelessness on "the part of the workman in charge of it, and the frequency with "which that contingency is likely to arise, are matters that must be "taken into consideration."

In *Blenkinsop* v. *Ogden* (2) Grantham J. said: "It was contended "for the respondents that that section cannot apply where the injury "was directly caused by the negligence of the injured person. But "I cannot accept that construction of the statute. In my view, where "the injury which results would not have happened but for the "unfenced condition of the machinery, the fact that the injured person "has also been negligent does not prevent the non-fencing of the "machinery from being that in consequence of which the injury "happened." A little lower on the same page Kennedy J. said: "here we are dealing with a section the primary object of which is "not to compensate the injured person, but to provide safe machinery. "It is to the interest of the State that the machinery should be safe "for negligent as well as for careful people, and it is reasonable that "the State should impose a penalty upon the party omitting to fence "even under circumstances under which the person injured by the "omission could not recover damages."

In *Davies* v. *Thomas Owen & Co.* (3) my brother Salter said: "The obligation imposed by the Factory and Workshop Act, 1901, in "relation to the fencing of dangerous machinery, is absolute. It is an "obligation not merely to fence, but to fence securely. The statute

(1) [1897] 1 Q. B. 192, 195.
(2) [1898] 1 Q. B. 783, 785.
(3) [1919] 2 K. B. 39, 41.

"does not say that dangerous machinery shall be securely fenced if "that is commercially practicable or mechanically possible. If a "machine cannot be securely fenced while remaining commercially "practicable or mechanically useful the statute in effect prohibits "its use."

In *Fotheringham* v. *Babcock & Wilcox, Ld.* (1), Lord Hunter, in words which are not, of course, binding on this Court, but which nevertheless are of great value, said on the facts of that case: "The "Sheriff-Substitute, in reaching a conclusion favourable to the "respondents, has been influenced by circumstances which do not "seem to me to have any bearing upon the legal questions involved"; and again, having regard to those considerations: "These considera-"tions, however, do not appear to me to have any direct bearing upon "the question whether or not the statutory protection should have "been afforded. The provision is intended to protect workmen against "carelessness, as your Lordship has said; and it would seem to me "to be an extraordinary doctrine that an employer could relieve "himself of the statutory obligation and the necessity for the provision "of adequate protection for his workmen by saying, 'We warned "'the workmen of the danger they ran.'"

And, finally, in 1926, not to mention the various unreported cases, there was *Atkinson* v. *London & North Eastern Ry. Co.* (2), where, if I may be permitted to repeat it, I said in that case: "What they "[the justices] mean by their decision is a question no doubt of some "difficulty and admits of some conjecture. It is to be observed that "one of the contentions before them on behalf of the respondents "was that the unfortunate man who was hurt was acting contrary "to regulations in attempting to remove the belt from the shaft to "the pulley while the engine was running, and it may well be that "what the justices had in mind was that to the bulk of the persons "employed in the factory, if they observed the regulations, this shaft "and pulley were just as safe unfenced as they would have been if "fenced. That, however, is not what the section contemplates. The "test is much more rigorous. The justices, before they can dismiss "the information in such a case as this, have to find that the gearing "complained of is equally safe to every person employed, or working "in the factory, as it would be if it were securely fenced." These passages which I have cited, and I might have cited others, are passages in judgments under the Factory and Workshop Act, but they are applicable, in my opinion, to such a case as this a fortiori where, with regard to the machinery in a coal mine, the Legislature has thought right for reasons which it is not difficult to understand to make the obligation more strict and less free from any sort of exceptions.

In this case it seems to me that there are two observations to be made. The first is that on the facts as stated it would be startling if any person could come to the conclusion that this shafting, placed where it was, used where it was, and oiled as it was, was anything other than exposed and dangerous. It is not even suggested that it was not exposed. What is urged is that, though exposed, it was not

(1) 1922 S. C. (J.) 60, 64.

(2) [1926] 1 K. B. 313, 316.

dangerous. Speaking for myself, I should be prepared to say on the facts proved or admitted in this case that there was no evidence on which the justices could fail to find that this machinery was exposed and dangerous. More than that, when one considers the whole of this case and reads one part of it in connection with the other parts, I think it is tolerably obvious that the justices have, inadvertently perhaps, put forward the explanation of the error into which they have fallen. Twice in the passages to which reference has been made —once in the statement of the facts, and once as the climax and conclusion of what appears to be stated as their judgment—they lay stress on the proposition that the deceased man had the shafting under his control and could have stopped it while he was greasing the cups. In my opinion, they make it perfectly clear that they have allowed their minds not merely to be affected but governed by an essentially irrelevant consideration. I am not suggesting for a moment, nor must anything which I have said be taken as suggesting, that there was here any carelessness on the part of this unfortunate man. That is not the issue before this Court; that is an issue which conceivably may be raised elsewhere. I am dealing and dealing only with this case as it is stated, and on this case as stated two things appear to me to be reasonably clear: one, that the justices could not on these facts find as they did, and, secondly, that they have found as they have done for the reason which they have twice repeated.

For these reasons I think that this appeal ought to be allowed and that the case ought to go back to the justices with a direction to find the offence proved.

AVORY J. I am of the same opinion. The fact that the justices have stated this case as a question of law is, in my view, conclusive to show that they themselves intended this Court to decide whether matters which they obviously took into consideration in coming to a conclusion that this shafting was not dangerous ought to have been considered by them in coming to that conclusion. That appears to me to be the only question of law which could properly be the subject of a special case. That being so, the authorities which my Lord has cited obviously show that the considerations which influenced the justices, and which they repeat more than once in the course of this case, were matters which they ought not to have taken into consideration in coming to the conclusion that the shafting was not dangerous. For that reason I agree that the appeal should be allowed and that the case should be remitted to the justices for them to find the offence proved.

SALTER J. I agree. On the part of the justices the best test which could be applied is that which has been read by my Lord. In the ordinary course of things the justices quite reasonably anticipated that there would be the ordinary working of the particular machinery. I think that the justices took into account at least two improper considerations. First, the reference to the notice with regard to the shafting and, secondly, the reference to the fact that the machinery

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could have been stopped to be greased satisfy me that they in fact asked themselves the question which was asked in the case of *Hindle* v. *Birtwistle* (1): Was this dangerous to a careful man? I think that they went beyond that. They twice, and prominently, point out that this machine could have been stopped to be greased by Quinn himself at that point or at any other. They do not find that the stopping of the machine to grease it would be in the ordinary course of work, but merely a precaution, and they seem to me quite clearly to have asked themselves whether the machine would be dangerous if reasonable precautions had been taken.

For these reasons I agree that the case must go back to the justices.

If the matter had rested with me I should not have added a direction to find the offence proved. I have some doubt whether we are justified in directing these justices on the facts stated in this case to find this particular machine dangerous without trespassing on their province as the sole judges of fact; but, in view of the opinion of my Lord and my brother Avory on the facts, I agree that the case must be sent back to the justices to find the offence proved.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *Corbin, Greener & Cook, for Arthur Neal, Scorah & Co., Sheffield.*

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(1) [1897] 1 Q. B. 192.

J. W. H.

THE KING *v.* BARNSTAPLE JUSTICES.

Ex parte CARDER.

1937
Oct. 26, 27.

Cinematograph—Licence—Delegation to justices of county council's powers—Premises not yet erected—Practice of applying to justices for approval of plans—Extra-judicial proceeding—Not subject to control by certiorari or mandamus—Cinematograph Act, 1909 (9 *Edw.* 7, *c.* 30), *ss.* 2, 5.

A county council delegated, under s. 5 of the Cinematograph Act, 1909, to justices sitting in petty sessions the council's powers under s. 2 of the Act to " grant licences to such persons " as they think fit to use the premises specified in the licence for " the purposes " of a cinematograph theatre.

Owing to the absence of any provision in the statute for the granting of provisional licences in respect of buildings not yet erected, a practice grew up of applying to justices to approve plans of a proposed building, it being understood that if the plans were approved—all opposition, if any, being heard on that application—a subsequent application for a licence would be granted as a matter of course when the building was completed in accordance with the plans :—

Held, that, since no power was given by the Act to the county council or to justices to approve plans, the justices in so doing, or in refusing to do so, were engaging in an extra-judicial proceeding which the Court could not control by certiorari or mandamus.

RULES NISI for certiorari and mandamus.

These rules were granted at the instance of one Arthur Ernest Carder, calling on twelve justices for the borough of Barnstaple " sitting to exercise under s. 5 of the Cinematograph "Act, 1909 (1), the powers delegated to them by the Devonshire "County Council pursuant to powers conferred upon the "said council by the said Act in respect of matters arising

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(1) The Cinematograph Act, 1909, s. 2, sub-s. 1 : " A county " council may grant licences to " such persons as they think fit to " use the premises specified in the " licence for the purposes afore- " said on such terms and con- " ditions and under such restric- " tions as, subject to regulations " of the Secretary of State, the " council may by the respective " licences determine."

Sect. 5 : " Without prejudice " to any other powers of delega- " tion, whether to committees of " the council or to district councils, " a county council may, with or " without any restrictions or con- " ditions as they may think fit, " delegate to justices sitting in " petty sessions any of the powers " conferred on the council by this " Act."

"within the said borough" to show cause (*a*) why a writ of certiorari should not issue directed to them to bring up and quash a certain determination by them dated March 25, 1937, refusing a certain application by the said Carder for the approval of plans for converting certain premises in the borough into a cinematograph theatre, which plans were in or about the beginning of 1936 approved and passed by the Barnstaple Corporation, and also approved by the superintendent of police; and (*b*) why a writ of mandamus should not issue commanding them or some of them to hear and determine the said application according to law. The grounds on which both rules were obtained was that certain of the justices were disqualified by reason of interest. This allegation was denied, but the Court did not go into the matter, as the rules were disposed of on a preliminary question.

No provision is made in the Cinematograph Act, 1909, for the grant of provisional licences in respect of premises not yet erected, such as the Licensing Acts relating to intoxicating liquor have contained since 1874. It was stated in the affidavit on behalf of the applicant: "As the said "Act makes no provision for the granting of a licence in "respect of premises not yet erected, the justices for the said "borough have always treated an application for approval of "plans as an application for a licence which is automatically "granted at a subsequent date if approval to the plans is "given."

Blanco White K.C. and *F. S. Laskey* showing cause. While the justices are anxious to have the allegation of bias disposed of, it is the duty of counsel to draw the attention of the Court to another point. The Cinematograph Act, 1909, gives no power to justices to approve plans. It appears to be a practice which has grown up in some parts of the country to meet the difficulty that building owners will not take the risk of erecting expensive buildings for which a licence might then be refused. There appears to be no power under this Act, as there is under the Licensing Acts relating to intoxicating liquor, to grant provisional licences for buildings not yet erected; so in many places there is a sort of "gentleman's "agreement," under which the building owner applies for approval of his plans. On that application, any opponents are heard, the whole matter is gone into, and if the plans are approved, it is understood that a licence will subsequently be granted as a matter of course for a building erected in accordance with those plans.

That may be a convenient practice, but it has no statutory authority, and it is submitted that the Court cannot bring up by certiorari an order which is made, not in excess of jurisdiction, but without any jurisdiction at all. Still less can the Court by mandamus order justices to hear and determine an application which they have no jurisdiction to hear.

G. D. Roberts K.C. and *King Anningson* in support of the rule. No rules have been laid down as to how justices shall exercise their delegated powers. They are therefore at liberty to frame their own procedure. Even if this procedure was in fact irregular, it was the procedure adopted by these justices, and the applicant was bound by it. He could not obtain his licence otherwise. If, therefore, justices, as he alleges, sat to hear his application while they were disqualified by interest, he is without redress if he cannot come to this Court for certiorari and mandamus.

The difficulty of directing justices to do that which they have no jurisdiction to do may be got over by amending the rules for certiorari and mandamus by omitting all reference to approval of plans, and reading "a certain application of "one Arthur Ernest Carder under the Cinematograph Act, "1909, in respect of certain premises," etc.

LORD HEWART C.J. These are two rules nisi for a writ of certiorari or, alternatively, a writ of mandamus to be directed to certain justices for the borough of Barnstaple.

The matter to which the attention of the Court has been invited is a matter of a somewhat peculiar kind. One cannot help observing at the outset that, whether the rule nisi for certiorari or the rule nisi for mandamus be considered, the justices referred to are described as "justices of the peace "in and for the borough of Barnstaple sitting to exercise, "under s. 5 of the Cinematograph Act, 1909, the powers "delegated to them by the Devonshire County Council pursuant "to powers conferred upon the said county council by the "said Act." It is therefore a matter of primary importance, logically as well as chronologically, to see what those powers are. [His Lordship read s. 2, sub-s. 1, and s. 5 of the Cinematograph Act, 1909.]

Apparently in this part of England the powers of the county council have been delegated to justices. But nothing could be delegated which is not to be found within the four corners of the statute. The county council cannot delegate to justices power to do that which the county council itself cannot do. Therefore, so far as the existing controversy is concerned, the only power which these justices have to exercise is the power to grant a licence to use premises specified in the licence for the purposes contemplated by the statute.

That being so, it is important to see what is the nature of the complaint. I turn again to the rule nisi for a writ of certiorari, which mutatis mutandis is in the same terms as the rule nisi for mandamus. The applicant desires that the justices should be directed to show cause for a certain determination by them, dated March 25 of this year, refusing a certain application of one Carder for the approval of plans for converting certain premises in the borough of Barnstaple, of which he is owner, into a cinematograph theatre, which plans were, in or about the beginning of 1936, approved by the Barnstaple Corporation and by the superintendent of police.

The fact leaps to the eye that there is not a syllable in this statute about the approval of plans. We are told from the Bar—and of course we accept it—that there is in this part of the country a practice, said to be convenient, whereby a person desiring ultimately to obtain a licence under the Cinematograph Act for certain premises, but not yet having erected those premises, seeks by anticipation to commit the justices to the honourable necessity of granting a licence if and when the premises shall have been constructed. It is perfectly obvious that there is, or there is believed to be, no power to grant a licence in respect of premises not yet in being. The licence which is to be granted is a licence to use the premises specified in the licence, and that means, of course, real premises. Therefore in order to avoid the difficulty and the expense of taking the risk involved, where the premises are to be new premises, in first erecting the building and applying for a licence afterwards, this scheme has apparently been devised whereby the justices may be asked to approve plans of a building to be constructed and thereby honourably commit themselves, or their successors, to an undertaking to grant the licence after the construction. Whether that course is convenient or whether it is ingenious are questions with which we need not concern ourselves. That in fact is what is done.

Whatever its merits may be, when in those circumstances the justices sit for the preliminary purpose of considering the plans, it seems to me to be quite impossible to argue, except of course for controversial purposes, that they are engaged in a judicial proceeding. They are engaged in an administrative proceeding for which something may be said and against which something undoubtedly may be said. This, for example, may immediately be said. There seem to be grave objections, from the point of view of the public interest, in taking or permitting a course by which, by securing from one body of persons express approval of certain plans of a building, it is sought to commit another body of persons to the grant of a licence after the building has been constructed. After a lapse of time, and in view of many considerations which may be relevant to the grant of a licence, the justices who are asked to grant the licence may have very strong objections to doing so.

But it is a matter of academic interest to consider the merits or demerits of this plan. The question is whether the justices, sitting for the preliminary purpose of considering plans of a building not yet constructed, are engaged in a judicial proceeding such as may be brought to the notice of this Court for the purpose of the prerogative writ of mandamus or certiorari. In my opinion it is impossible to contend that the justices are so engaged. Mr. Roberts has really found himself in a dilemma. Either the application which was before these justices was an application for the grant of a licence or it was not. If it was an application for the grant of a licence, it was for the grant of a licence in respect of premises not yet in being. There has been no request for such a grant and no refusal to make it. If it was an application for the approval of plans, that was an application for something not contemplated or provided for by this statute; it was essentially an extra-judicial proceeding in a matter not known to the law. It seems to me that this is clearly not a case either for a writ of certiorari or for a writ of mandamus.

Lastly, Mr. Roberts has very properly asked us to look beneath the form to the substance. He has, indeed, suggested certain amended rules nisi which he thinks might meet the difficulties that have been raised. I need not dwell upon them. In effect, they do not meet the difficulties and they cannot; the difficulties are too fundamental to be dealt with in that way. When one does look beneath the form to the substance, the substance appears to me to be that the difficulty, amounting perhaps to an impossibility, of getting a cinematograph licence for premises not yet in being has caused those who are interested to look about for a circuitous route to the same goal. Those who have to do with the granting of licences for the sale of intoxicating liquor were faced by exactly the same difficulty long ago, but the difficulty was not surmounted or evaded by an ingenious arrangement. It was surmounted by the express provisions of a statute. It seems to me that it will take the express provisions of a statute to get rid of the difficulty which lies at the root of the present trouble. However that may be, I have no doubt that, upon the materials which are before us, this is not a case for either a writ of certiorari or of mandamus, and I think that these rules ought to be discharged.

HUMPHREYS J. I am of the same opinion.

I desire to add a few words, because Mr. Roberts has argued before the Court that the view expressed by my Lord as to the law, in which I entirely concur, will result in hardship or, it may be, injustice to the applicant for the rule.

Historically, the matter rests in this way. From before the year 1828 to the year 1874 licences for the sale of intoxicating liquor were granted to persons in respect of premises. In 1874, when Parliament was passing a statute primarily to amend the Act of 1872 which had consolidated most of the previous statutes, it was thought desirable to get rid of a difficulty which had arisen, a difficulty which has been referred to in this case—namely, that a licence could only be granted to premises, which meant existing premises. Accordingly in that Act it was provided, and provided for the first time, that any person interested in any premises about to be constructed or in course of construction for the purpose of being used as a house for the sale of intoxicating liquors, might apply to the justices for a provisional grant of a licence, and the justices, if satisfied with the plans of the house supplied to them and if satisfied that if the premises had been actually constructed in accordance with those plans they would have granted such a licence, might make a provisional grant. That was in 1874, and that provision has been repeated throughout modern Acts of Parliament and is the law to-day.

In 1909 Parliament was providing for that novel kind of entertainment which has come to be written, and I suppose pronounced, " cinematograph." When one looks at the statute it appears to be very difficult to assume that Parliament did not intentionally leave out any machinery for granting provisional cinematograph licences to premises about to be constructed. Parliament cannot have been unaware of the difficulties which would arise, and I think it is a fact which cannot be overlooked that Parliament, for what must be assumed to be good and sufficient reasons, decided not to make any provision in this Act comparable with the provision to which I have referred in the Act of 1874.

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Humphreys J.

Mr. Blanco White, I think perfectly properly, whether his clients wished it or not, thought it right as a member of the Bar to draw our attention to what might be a legal difficulty. He admitted quite frankly, in answer to a question from myself, that what has been done in Barnstaple and, he says, elsewhere, is this. Faced with the difficulty of suggesting that a licence under the Cinematograph Act can be granted to premises not in existence, the justices have adopted a practice resulting in a sort of " gentleman's agreement," as it has been referred to in other matters, between the justices and the owners of premises which are, or are intended to become, cinematograph houses. The agreement is that, instead of applying for a licence and on the assumption (whether rightly or wrongly I do not think we are called upon to say) that a licence cannot be granted to premises not yet erected, an application is made for the approval of plans in respect of the house proposed to be erected. Then, if the justices approve those plans, an application is made to a subsequent bench of justices at a time which in all human probability will be at the very least six months and more likely a year afterwards, when the premises are built, for a licence under the terms of the Cinematograph Act. It is said that in those circumstances the subsequent bench of justices will feel itself bound by the decision of other justices on an application entirely unknown to the law.

I wish to guard myself against being supposed to be saying that such a practice is illegal. I see nothing illegal in it. Whether it is convenient or whether it is desirable I express no opinion. What this Court is asked to do is to say that justices sitting in those circumstances and hearing and deciding such an application are justices sitting in a capacity which enables this Court to control their proceedings by certiorari or mandamus. In my opinion there is no such power. A writ of certiorari does not, nor does a writ of mandamus, go to justices who happen to be meeting as a matter of convenience and expressing views; it goes to them when they are sitting—I would use the words " as a " court " but for the fact that they might be licensing justices, when they are not a court in the true sense—in a judicial capacity under the terms of some statute.

There is one other observation which I desire to make. Mr. Roberts has asked us, and urged us with considerable force, to look in this matter at the substance and not at the form. In regard to that argument, which is always an attractive one, I think it well to draw attention, not for the first time, to the language of Lord Halsbury in *Laceby* v. *Lacon & Co.* (1), an unanimous opinion of the House of Lords. In that case it was said that the justices had done something which, on the face of it, was perfectly legal; they had granted a licence, but they had granted it in circumstances which made it in effect the removal of a licence. They had no power to do that, because the owner of the premises from which the licence was to be removed had a right of veto under the statute. That was the argument. It had found favour in the Divisional Court and the Court of Appeal. The House of Lords reversed the judgment of the other Courts. In expressing his opinion in the House of Lords, Lord Halsbury said this: "Now, I quite follow what "Mr. Lawson Walton and Mr. Foote have so ingeniously and "earnestly pointed out, that the result arrived at may be the "same as would have been arrived at by a 'removal.' Granted. "But what then? The thing that the magistrates have done is "not the thing which is contemplated by the 50th section"; —that is the section which deals with removal—"that is "to say, not the same as regards the actual order. Whether "it is the same thing in substance or not I will treat of in a "moment, but it is not the thing." Then after making some other remarks his Lordship returns to the question of form and substance and says this (2): "My Lords, the observa-"tion immediately arises that where you are dealing with "a subject-matter of this sort the form is part of the substance. "It is a delusion to suppose that magistrates may do what "may be equivalent to this, that, or the other. They are "within the iron framework of a statute, and they have no "jurisdiction to go beyond it." He observes that all that they did do, and all that they intended to do, was that they granted a licence to a person which they had power to do.

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(1) [1899] A. C. 222, 228.

(2) Ibid. 229.

In my view whether the justices were in effect granting a licence, or in effect making it impossible for their colleagues who might be sitting at a later date to refuse a licence, is not a matter which this Court can take into consideration. They did not grant a licence, and the reason they did not grant a licence was that nobody applied to them for a licence.

For these reasons and for the reasons expressed by my Lord in his judgment, I agree that these rules are asked for in circumstances in which the Court has no power to grant them.

DU PARCQ J. I agree.

As this Court is refusing to consider evidence which was proposed to be adduced before it on the ground that, whatever view it took, it could not make these rules absolute, and also because it was suggested at the Bar that some injustice might be done to the applicant by too close an attention to the form rather than to the substance of the matter, I think I ought to add a few words in order to express my complete agreement with the order proposed.

There is no doubt that if there is ground for saying that there was bias in this case the Court would have dealt, by mandamus or certiorari, with an order made by these justices in proceedings in which it was their duty to make an order. It is enough, for the purposes of this case, to say that this Court has never interfered, and will never interfere, with something which is not an order or a determination at all, but which, putting it at its highest, is an intimation of what may happen when an application which has not yet been made is made at some later date. The jurisdiction of the justices under this Act is, as has been pointed out, strictly limited. Powers are delegated to them by the council, and the council can only delegate such powers as the council itself possesses. The power in question here is a power to grant a licence. Any applicant for a licence must give not less than seven days' notice to certain persons of his intention to apply for a licence.

We are told that in substance there has been a refusal to grant a licence. There are, it seems to me, many criticisms to be made of that assertion. I do not know whether it is necessary to decide definitely in this case whether or not a licence may be granted in respect of premises not yet built. I observe that it is a point upon which the solicitor who swore an affidavit in support of the application for these rules has no doubt himself, because in para. 7 of his affidavit he says this: "As the said Act"—that is the Cinematograph Act—"makes no provision for the granting of a licence in "respect of premises not yet erected, the justices for the "said borough have always treated an application for approval "of plans as an application for a licence which is automatically "granted at a subsequent date if approval to the plans is "given." Having heard the argument, I suppose we ought to read into that the further words: "which is automatically "refused at a subsequent date, if it should be applied for, "if approval to the plans is not given." Indeed, Mr. Roberts went so far as to say—and he may be right—that he thought the justices would be disposed, through their clerk, not even to accept an application for a licence where approval of plans had not been given.

Without saying whether this arrangement can be stigmatized as illegal, in my view it is highly inconvenient. I have no doubt that it is still open to the applicant here to apply for a licence. I do not say that he is entitled to apply for a licence even though his premises are not built; I express no opinion one way or another upon that question. If he is entitled so to apply, and if he is so advised, let him do so; he has not done so yet. If he is not, let him wait until the premises are complete and then let him apply. The proceedings which have taken place appear to me inconvenient, because I cannot help feeling that, should the same justices be sitting when the application was made, they might find their position embarrassing and unfortunate. That, however, is not a matter which it is necessary to deal with now.

One thing seems to me to be quite certain; that is, that there is no power in the county council and, therefore, no power which could be conferred upon the justices, to give binding intimations as to future events and to lay it down that a licence will later automatically be granted or that a licence in the future will certainly be refused. It would obviously fetter the hands of other persons. It seems to me to be unarguable that any body of persons exercising, I do not say judicial functions, but such functions as it is the duty of justices in these cases to exercise, can (to use a phrase which has been used during the hearing of this case) by what is called a " gentleman's agreement " fetter, limit, control or in any way affect their own future decisions or those of other justices in the future. As a matter of fact, no application for a licence is before them.

I think that here there is no determination by these justices with which we can deal, and I think that the applicant has taken a wrong course in coming here with these proposals. I agree that the rules must be discharged.

Rules discharged.

Solicitors showing cause : *Gibson & Weldon, for S. A. Copp, Barnstaple.*

Solicitors supporting the rule : *Torr & Co., for Toller, Oerton & Balsdon, Barnstaple.*

J. W. H.

KINGMAN *v.* SEAGER.

1937
Oct. 28.

Motor car—Dangerous driving—Excessive speed—No actual danger to public, but potential danger to traffic reasonably to be expected to be on road—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 11, *sub-s.* 1.

The offence of dangerous driving under the Road Traffic Act, 1930, s. 11, sub-s. 1, is complete if potential danger to traffic which might reasonably be expected to be on the road is proved, it being unnecessary to establish actual danger to any member of the public.

Per Humphreys J. The danger to which the section refers is to be found in the speed itself. Where the speed at which a vehicle is driven is in itself a dangerous speed, no other circumstance need be taken into consideration.

Case stated by justices.

At a court of summary jurisdiction sitting at Middlewich, Cheshire, on May 28, 1937, on the information of the appellant, George Kingman, a superintendent of police, the respondent, William Seager, was charged with an offence against sub-s. 1 of s. 11 of the Road Traffic Act, 1930, (1) for that he on February 20, 1937, at Arclid, Cheshire, unlawfully did drive a certain motor vehicle, to wit, a heavy motor car, on a certain road there called Newcastle Road at a speed which was dangerous to the public having regard to all the circumstances of the case, including the nature, condition, and use of the said road, and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the said road.

Upon the hearing of the information the following facts were proved or admitted :—

On the occasion in question the respondent, a motor driver, drove a heavy motor car, of a total laden weight of 15 tons 8 cwts. 2 qtrs. The maximum speed allowed by law for a vehicle of this description was 20 miles an hour. The vehicle was driven along Newcastle Road, Arclid, at a speed of 36 miles per hour and at this speed it crossed over Arclid cross roads and then accelerated to 40 miles per hour and maintained approximately that speed for nine-tenths of a mile. It slowed to 33 miles per hour going round a bend at Brereton. At some times the vehicle occupied the centre of the road, but no other traffic and no member of the public was actually placed in a position of danger. The road was a class A wide main road and carried a heavy volume of traffic from Liverpool and Manchester to the Potteries and London. There was one cross road, one bend, and one converging road on the material length of road. At the cross road, on the minor road on each side there was a " Halt " sign, and on the converging road, which was a minor road, there was a " Slow " sign. When requested to stop the respondent pulled up in 10 yards. The vehicle had been driven by the respondent over a period of two and one half years and the average weekly mileage was 1500. The vehicle was in good condition, having only one week previously been returned by the makers after being reconditioned.

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(1) By the Road Traffic Act, 1930, s. 11, sub-s. (1): "If any "person drives a motor vehicle on "a road . . . . at a speed . . . . "which is dangerous to the public, "having regard to all the circum- "stances of the case, including the "nature, condition, and use of the "road, and the amount of traffic "which is actually at the time, or "which might reasonably be "expected to be, on the road, he "shall be liable" to a fine.

The justices decided that, although the lorry was being driven at a speed in excess of the legal speed limit, in view of the condition of the vehicle, the type of road, and the situation of the occurrence, the speed was not in fact dangerous to the public. Consequently, they dismissed the information.

The appellant appealed.

Edgedale for appellant. The justices should have convicted the respondent, since it was obvious from the facts which they found that he drove the lorry at a speed which was dangerous having regard to the amount of traffic which might reasonably be expected to be on the road, even though no traffic and no member of the public was actually endangered. The justices seem to have thought that for the offence of dangerous driving to be made out some actual danger to the public must be proved. That is wrong. In the present case every element of potential danger was present and that was sufficient to secure the conviction of the respondent.

The respondent did not appear.

LORD HEWART C.J. I cannot help feeling that the use in the case stated of the phrases "actually placed in a position "of danger" and "in fact dangerous" shows what was in the mind of the justices; but s. 11, sub-s. 1, of the Road Traffic Act, 1930, is not directed only against a speed which in fact in a particular place puts certain members of the public in danger. The section makes it an offence to drive at a speed which is dangerous to the public when all the circumstances are taken into consideration, including the use of the road and the amount of traffic which is not only actually on it at the material time but which also might reasonably be expected to be on it.

I find it impossible to reconcile the decision of the justices with the facts which they have found. The road was a class A wide main road, carrying a heavy volume of traffic from Lancashire to the Potteries and London. There was a cross road and a bend in it and another road converging to it, and the cross road and the converging road had warning signs where they joined the main road. On those facts I do not think that it was open to the justices to find that there was no danger to traffic which might reasonably be expected to be on the road. The justices seem to have confounded the potential with the actual, and to have taken the view that, for the respondent to be guilty, they had to find that there was in fact danger to ascertained members of the public.

The true view is that there was danger to the public, regard being had to the amount of traffic which might reasonably be expected to be on the road. On the facts which the justices found, there was no room for the opinion that the evil which the statute seeks to prevent was not exhibited here. The justices, as a reasonable tribunal, could not find that there was not a real, although a potential, danger to traffic which might reasonably be expected to be on the road.

I, therefore, think that the appeal should be allowed and the case go back to the justices with a direction to find that the offence which was charged was proved.

HUMPHREYS J. I am of the same opinion, although a very strong case is always required to be shown before this Court will differ from a bench of justices who have acquitted a person on a criminal charge.

If, on such a statement of facts as we have here, justices are to be at liberty to say that the offence of dangerous driving is not proved, then no person can be convicted of that offence unless there has actually been an accident or the probability of one. The justices have misinterpreted this very salutary section. It would be quite absurd to say that there are not some speeds which in themselves must be dangerous to the public, and in the present case the justices had to decide whether the speed of between 30 and 40 miles an hour at which this lorry weighing more than 15 tons was driven was in itself dangerous. Could any one, using ordinary common sense and the word "dangerous" in its ordinary meaning, say that such a speed for such a vehicle across a cross road and round a bend was not a dangerous speed? Such a speed in such circumstances must be dangerous. Whatever was the amount of traffic actually on the road at the material time, there might reasonably be expected to be a considerable volume of traffic on it.

I understand the finding of the justices to mean that a speed cannot be "dangerous" unless some element of actual danger is proved. That is wrong. The danger to which the section refers is to be found in the speed itself. A speed which is perfectly lawful may be found to be dangerous in certain circumstances, and when the speed is found to be at times double the lawful speed on a road such as one is dealing with in the present case, it is obvious that there can be no justification for the justices declining to find that a speed has been proved which was in itself a dangerous speed. Where the speed at which a vehicle is driven is in itself a dangerous speed, no other circumstance need be taken into consideration. I agree that the appeal should be allowed.

DU PARCQ J. In my opinion the justices found facts from which the only conclusion which can be drawn by reasonable persons honestly applying their minds to the question before them is that the offence charged was committed. That being so, I am bound to assume that the justices did not correctly apprehend the law. I, therefore, agree that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Gregory, Rowcliffe & Co., for G. C. Scrimgeour, Chester.*

G. F. L. B.

1937
Oct. 29.

REX *v.* SHOREDITCH COUNTY COURT REGISTRAR AND ANOTHER.

Ex parte SAXON FINANCE CORPORATION, LIMITED.

County Court—Venue—Action on guarantee—Guarantee of payment by instalments for goods—"Action founded on contract for sale of "goods and payment to be made by instalments"—County Court Rules, 1936, *Order II., r.* 1, *sub-rr.* 1, 3.

By a contract in writing between H. H. and a cycle manufacturing company, H. H. requested the company to supply him with a bicycle and undertook in consideration of their doing so to pay to the applicant corporation a deposit and the balance of the purchase price by instalments at the address of the applicant corporation, which was within the district of the S. county court. By an agreement in writing between S. H. and the applicant corporation, S. H., who did not reside or carry on business within the district of the S. county court, agreed that, in consideration of the bicycle being supplied to H. H. "on the terms of the said "order, should H. H. make default in due payment of any "instalment or instalments of the price" of the bicycle "the "whole sum shall immediately become due and I will, on demand, "pay the same to you in London."

The bicycle was supplied to H. H., who paid certain instalments of the purchase price and then made default. The applicant corporation then sought to sue S. H. in the S. county court on his guarantee for the balance due:—

Held, that the proposed action was founded, mainly if not wholly, on a contract for the sale of goods for which payment was to be made by instalments within Order II, r. 1, sub-r. 3, of the County Court Rules, 1936, and not merely on the guarantee, so that it could not be brought in the S. county court, but must be brought in the court for the district in which the defendant resided or carried on business as provided by r. 1, sub-r. 1 (*a*).

ORDER NISI.

By a contract in writing dated June 4, 1936, and made between one Harry House and the Saxon Cycle Engineering Co., Ld., Harry House requested that company to supply him with a bicycle and undertook in consideration of their doing so to pay to the Saxon Finance Corporation, Ld. a deposit of 1*l.* and the balance of the purchase price by instalments at the address of the corporation, which was within the district of the Shoreditch county court.

By an agreement in writing dated June 8, 1937, and made between Harry House's father, Samuel House, and the corporation, Samuel House agreed that in consideration of the bicycle being supplied to Harry House "on the terms of the "said order" of June 4 "should Harry House make default in "due payment of any instalment or instalments of the price" of the bicycle "the whole sum shall immediately become due "and I will, on demand, pay the same to you in London."

The bicycle was supplied to Harry House, who paid certain instalments of the purchase price and then made default. The corporation then sought to sue Samuel House in the Shoreditch county court on his guarantee for the balance due. Samuel House did not reside or carry on business within the district of the Shoreditch county court, and the registrar of the court refused to cause a summons to be issued. The corporation thereupon obtained an order nisi calling on the registrar and Samuel House to show cause why the registrar should not cause a summons to issue out of the Shoreditch county court "in an action against the "said Samuel House upon a claim for balance due under a "guarantee agreement."

The grounds on which the rule was obtained were that the proposed action was an action against a guarantor in writing for the sum due from him as such guarantor and, as the guarantee provided for payment to be made at the corporation's offices in London, the cause of action partly arose at that address and within the district of the Shoreditch county court; that the proposed action, being on a guarantee, could be brought in that court under Order II., r. 1, sub-r. 1 (*b*), of the County Court Rules, 1936 (1); and that it was not an action founded on a contract for the sale of goods payment for which was to be made by instalments within Order II., r. 1, sub-r. 3, of the Rules and so need not be brought in the court for the district in which Samuel House resided or carried on business.

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(1) By the County Court Rules, 1936, Order II., r. 1.: "(1.) Except "where by any Act or Rule it is "otherwise provided, an action "may be commenced . . . . (*a*) "in the court for the district in "which the defendant . . . . "resides or carries on business; "or (*b*) subject to the succeeding "paragraphs of this Rule, in the "court for the district in which "the cause of action wholly or in "part arose . . . . (3.) Where "the action is founded on a con-"tract for the sale or hire of goods "and payment is to be made by "instalments, paragraph (1.) (*b*), "of this Rule shall not apply."

Valentine Holmes showing cause. The Order should be discharged. The proposed action cannot be commenced in the Shoreditch county court since it is founded substantially on a "contract for the sale of goods" for which "payment was "to be made by instalments" within Order II., r. 1, sub-r. 3, of the County Court Rules, although it is true that in form it would be merely an action on the guarantee of June 8, 1937. The real basis, however, of that guarantee, and consequently of the proposed action, is the contract of June 4.

Douglas Potter supporting the order. The cause of the proposed action is a failure to perform the guarantee and for the present purpose the Court will not look behind that, any more than in *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* (1)—a case on the question whether or not an action was "founded "on contract" within s. 11 of the County Courts Act, 1919 (now s. 47 of the County Courts Act, 1934)—the Court would regard anything other than the actual and effective cause of action.

LORD HEWART C.J. The ground on which it is contended that this order should be made absolute is that the proposed action against Samuel House was founded on the guarantee given by him on June 8, 1937, and that it was not founded, in the words of Order II., r. 1, sub-r. 3, of the County Court Rules, 1936, "on a contract for the sale of goods" under which "payment is to be made by instalments." We have, therefore, to consider the meaning of the relevant part of this rule.

It is manifest, when the subject-matter of the rule and the type of action which is being dealt with are borne in mind, that the object of the rule is to prevent undue hardship to defendants who are unlikely to be persons of considerable means. The primary provision of the rule is that the plaintiff must seek the defendant and not bring him to give his answer where the plaintiff may be. An exception to this general

(1) [1936] 1 K. B. 399.

principle is to be found in sub-r. 1 (*b*), but that again is subject to the provisions of sub-r. 3.

The question which we have to decide, therefore, is whether it is true to say that in the proposed action the applicant corporation would be concerned not merely with the guarantee but also and inevitably with the contract for the sale of the bicycle and payment for it by instalments. Certainly the guarantee is in itself a contract, but the contract for the sale of the bicycle is written all over it. It is the contract of sale which alone gives meaning to the guarantee. To the contract of sale one must look to see what are the terms which are referred to in the expression of the consideration for the guarantee, what instalments have to be paid, when default arises, the extent of the guarantor's liability, and so on. It seems almost too clear for argument that the principal contract with which we are concerned in this case is the contract for sale of June 4 and that the proceedings contemplated by the applicant corporation were manifestly founded on "a contract "for the sale of goods" for which "payment is to be made "by instalments" within Order II., r. 1, sub-r. 3. If the contract of sale of June 4 were taken away, the whole substratum of the guarantee would go and the applicant corporation would merely have a guarantee which would be in the air, unintelligible and inexplicable. If the proposed action came on, the corporation would clearly have to refer to the contract as well as to the guarantee.

The contract of sale of June 4 was, therefore, the foundation of the proposed action by the applicant corporation, and this order must be discharged.

HUMPHREYS J. I also am of the opinion that the applicant corporation were seeking to commence an action which was founded on a contract for the sale of goods payment for which was to be by instalments. That contract was, indeed, not only the substratum, but also the causa sine qua non of the proposed action, and consequently it is, in my view, a proper construction of Order II., r. 1, sub-r. 3, of the County Court Rules, 1936, to say that the action was "founded" on that contract.

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Humphreys J.

It has been argued that the expression "founded" in the rule should be interpreted in the light of the cases which have been decided on enactments in the terms of the present s. 47 of the County Courts Act, 1934, whereby provision is made for the costs of actions founded on contract brought in the High Court when they might have been brought in the county court and the costs of actions founded on tort in similar circumstances. I agree with those decisions, but we are dealing in the present case with a totally different subject-matter—namely, whether a particular action comes within a rule which prevents its being started in a place where otherwise it could be brought. In that connection the words "founded on contract" should, in my judgment, be given their ordinary meaning, and where an action is so dependent on a document that it cannot proceed without consideration of it, that action, I say without hesitation, must clearly be founded at least in part on the document.

For these reasons I think that the registrar of the county court was right in refusing to cause the summons to issue.

DU PARCQ J. I have come to the same conclusion. I agree that we do not derive much assistance from cases decided on the terms of s. 47 of the County Courts Act, 1934. The question in those cases arose by reason of the use by the Legislature of language which was not very precise and the fact that an action may be founded partly on contract and partly on tort. The Courts dealt with that difficulty and, in doing so, did what we must do to-day—sought to give effect to the purpose of the enactment and the intention of the Legislature. The effect of the decisions was that if an action was in substance one of tort it was to be regarded as "founded on tort" for the purpose of the section in question. The plaintiff was to get High Court costs if his action were one in which, although it might be necessary for him to prove a contract, he was entitled to damages in tort. The Court regarded the substance of the matter and did that which it was plain from the language of the enactment the Legislature intended.

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du Parcq J.

That is what the Court is trying to do here. When Order II., r. 1, is read as a whole, it appears that the Legislature does not intend persons to be harassed by actions being brought against them in districts remote from the places in which they live or carry on business when the claims against them are small and of a particular nature. If one puts a reasonable construction on the words of the rule "action founded on a "contract for the sale of goods," remembering the scope and object of the rule, it seems to me to be abundantly clear that the action proposed by the applicant corporation falls within them.

Order discharged.

Solicitor showing cause: *Treasury Solicitor.*

Solicitors in support: *Vivash Robinson & Co.*

G. F. L. B.

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Nov. 11, 12, 18.

BESSELER WAECHTER GLOVER AND COMPANY *v.* SOUTH DERWENT COAL COMPANY, LIMITED.

Sale of goods—Contract—Parol contract—Variation—Voluntary forbearance—Delivery postponed—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4.

In a contract for the sale of goods a term as to delivery of the goods is a term of the sale, and an alteration of that term is an alteration of the contract, which must be evidenced in writing, if the goods are of the value of 10*l.* or upwards, in accordance with the Sale of Goods Act, 1893, s. 4. The general principle to be deduced from the authorities is that if the parties agree to substitute a new contract for the original contract, or to vary its terms, that agreement must be in writing.

But if the variation is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the contract, the original contract is not affected, and the obligation to deliver and to accept the full contract quantity still continues.

Stead v. *Dawber* (1839) 10 Ad. & E. 57; *Hickman* v. *Haynes* (1875) L. R. 10 C. P. 598; *Plevins* v. *Downing* (1876) 1 C. P. D. 220; and judgment of Martin B. in *Tyers* v. *Rosedale and Ferryhill Iron Co.* (1873) L. R. 8 Ex. 305 considered.

Judgment of Lord Atkinson in *Morris* v. *Baron & Co.* [1918] A. C. 1, 30, applied.

SPECIAL CASE stated by an umpire.

The claimants were the buyers and the respondents the sellers of "West Stanley unscreened coking coals" to be supplied to the Ford Motor Co., at Dagenham, Essex, under three contracts (A, B and C) dated March 18, 1935, October 10, 1935, and November 6, 1935, respectively. Contract A was for 48,000 tons to be delivered in about equal monthly quantities from April 1, 1935, to December 31, 1935, to be mutually arranged. Contract B was for 40,000 tons in about equal monthly quantities from January 1, 1936, to June 30, 1936; and contract C was for 70,000 tons to be delivered in about equal monthly instalments from April 1, 1936, to December 31, 1936. The coal was supplied from two pits in County Durham, owned by the respondents. A dispute having arisen between the claimants and the respondents as to the respondents' liability to deliver coal to the claimants under contract C, the difference was submitted to arbitration under the Arbitration Acts, 1889 to 1934. The buyers claimed delivery of the balance of coal or damages for non-delivery. The two arbitrators nominated by the parties failed to agree and appointed an umpire, who stated this case for the opinion of the Court. The facts as found by the umpire and stated in the special case, so far as material, were as follows :—

No specific dates of delivery were mentioned in Ford's contracts with the claimants, as the coals were sold "F.A.S. "Dagenham" delivery "as arranged" or "as scheduled." The procedure was that Fords informed the claimants of their requirements for the following month about a month in advance and the claimants then sent to the respondents "stemming" notes which indicated the quantity of coal required, the name of the ship, and the approximate date of her readiness to load. The claimants allocated all the coal purchased under the above contracts against their contracts with Ford. The respondents knew that their coal was destined for Ford, but did not undertake to be bound by Ford's requirements as distinct from the terms of their contracts with the claimants. In October, 1935, a director of the claimants, called Nicholson, told one Cameron, representing the respondents, that Ford would like to have deliveries expedited if possible. Cameron said that they might be able to expedite deliveries of coal under contracts A and B, so that the quantity contracted for under contract B would be delivered by the end of March, 1936, instead of by the end of June, 1936, but no undertaking to that effect was given by Cameron.

In expectation of this the claimants entered into contract C for 70,000 tons of coal to be delivered by the respondents in about equal monthly instalments from April 1, 1936, to December 31, 1936. In April, 1936, it appeared that as deliveries under contracts A and B had not been expedited, as hoped, deliveries under contracts B and C would overlap during April, May and June, 1936, so that about 14,444 tons per month would be due for delivery under both contracts. It was then verbally agreed between the claimants and the respondents that, notwithstanding the terms of contract C, deliveries under that contract should not commence until deliveries under contract B had finished, that deliveries should then begin in accordance with contract C, and that the coal undelivered under contract C on December 31, 1936, should thereafter be delivered. No definite arrangement was made as to the date on which arrears under contract C should be delivered after December 31, 1936. The umpire found that this agreement was at the time to the mutual advantage of both claimants and respondents and was so considered by them.

In pursuance of this verbal agreement the claimants did not ask the respondents to deliver coal to them in April, May, June and July, 1936, under contract C until deliveries under contract B had been completed on July 10, 1936. No communications passed between the claimants and the respondents regarding the fact that deliveries were not asked for during that period. After July 10, 1936, the claimants asked for and obtained deliveries of the monthly quantities under contract C. On December 1, 1936, the respondents wrote repudiating any liability to deliver coal under contract C after December 31, 1936, but the claimants called for further deliveries in January, February and March, 1937. On December 31, 1936, the quantity of coal undelivered under contract C was 27,966 tons. Subject to the opinion of the Court the umpire held that the time of delivery stated in contract C was of the essence of the contract.

The umpire further held that there was not a sufficient memorandum in writing of the parol agreement varying the terms of contract C and that that agreement was unenforceable at law. He held that the claimants were not entitled to specific performance of the contract and that the respondents were not liable in damages for non-delivery of the 27,966 tons of coal. The question for the opinion of the Court was whether, on these facts, the award was correct in law. In the event of the Court holding that his award was incorrect he fixed the damages payable to the claimants for the non-delivery of the coal at 4194*l.* 18*s.*

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A. T. Miller K.C. and *R. E. Gething* for the claimants. The verbal alteration of the contract here only affected the terms of delivery and, for this, writing is not necessary under the Statute in order that it shall be enforceable. It was a modification of the time of delivery acceded to by one party at the request of the other. No new contract was substituted, but only a postponement of the date of delivery at the request of one party. There is no finding as to which party made the request, they mutually agreed to the alteration and in all other respects were ready and willing to perform the contract. In such a case the contract is not varied at all, but the mode and manner of its performance is altered by a voluntary forbearance agreed on by the parties. This interpretation of the requirements of the Statute is given by Lord Atkinson in *Morris* v. *Baron & Co.* (1)

[GODDARD J. Do you say that it makes a difference from which side the request for the variation comes ?]

No, we submit that it is immaterial : *Leather Cloth Co.* v. *Hieronimus* (2) and Benjamin on Sale, 7th ed., p. 725. Certainly if the request came from the respondents we are entitled to delivery under the amended contract.

If, however, it is held that this is a variation resulting in a new contract, then that contract did not relate to a sale of goods and is not within the Sale of Goods Act, 1893, s. 4. The view that no new contract was created by the alteration is supported by the judgment of Martin B. in *Tyers* v. *Rosedale and Ferryhill Iron Co.* (3), a decision which was affirmed in the Exchequer Chamber where this point in the judgment of Martin B. is not questioned.

Finally there has been receipt and acceptance on delivery of the coal under the contract of April, 1936. This amounts to part performance and renders the contract enforceable even if writing is absent.

J. V. Naisby (*G. N. W. Boyes* with him) for the respondents. The award recites that the parties were not in agreement, and it is clear that it was the claimants and not the respondents

(1) [1918] A. C. 1, 30.

(2) (1875) L. R. 10 Q. B. 140.

(3) (1873) L. R. 8 Ex. 305, 316; L. R. 10 Ex. 195.

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who requested postponement of delivery. The arbitrator has found that time was of the essence of the contract, and therefore an alteration in the time for delivery is not a mere alteration of the mode of performance, but is a variation of an essential term of the contract and must be evidenced in writing if it is to be enforced: *Stead* v. *Dawber* (1) is conclusive in my favour as to this. As regards the judgment of Martin B. in *Tyers* v. *Rosedale and Ferryhill Iron Co.* (2) the passage is not referred to in the judgments of the Exchequer Chamber. It is a question of fact in each case whether time is of the essence of the contract, and here the arbitrator has found that it is. *Morris* v. *Baron & Co.* (3) decides that a written contract for the sale of goods over 10*l.* may be rescinded by a parol contract, where the intention is not to vary but to rescind. An extension of time by parol is variation and not rescission and a written memorandum is necessary: *Hickman* v. *Haynes* (4); *Plevins* v. *Downing.* (5) (He cited also *Morrell* v. *Studd and Millington* (6); *Willmott* v. *Barber* (7); and *Bentsen* v. *Taylor, Sons & Co.* (8))

As regards the plea of part performance, the deliveries here were referable not to the parol agreement of April, 1936, but to the original contract of November, 1935, and cannot have the effect claimed. The verbal contract is inconsistent with the original contract and the fact of delivery affords no remedy for the absence of writing required by the Statute. The original contract is alone enforceable, and the award was correct in law.

Miller K.C. in reply. The findings of the arbitrator show that there was no contractual intention by the parties here and no binding agreement to displace the original contract. It has never been held that the alteration of a term of an existing contract by a new arrangement, made for the convenience of the parties, constitutes a new contract. If that be so, it is a matter of evidence, and seeing that there is

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(1) 10 Ad. & E. 57.

(2) L. R. 8 Ex. 305, 316; L. R. 10 Ex. 195.

(3) [1918] A. C. 1.

(4) L. R. 10 C. P. 598.

(5) 1 C. P. D. 220.

(6) [1913] 2 Ch. 648.

(7) (1880) 15 Ch. D. 96, 105.

(8) [1893] 2 Q. B. 274.

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here part performance of the new terms as to delivery, the need for writing is displaced.

Cur. adv. vult.

1937. Nov. 18. GODDARD J. read the following judgment: The arbitration in which this award in the form of a special case is stated arises out of a contract between the claimants as buyers and the respondents as sellers of 70,000 tons of coal, made in November, 1935. The only question that has to be decided is one under s. 4 of the Sale of Goods Act, and for this purpose the facts can be very shortly stated.

On October 10, 1935, the respondents sold to the claimants 40,000 tons of coal to be delivered in equal monthly quantities from January 1 to June 30, 1936. Soon after this contract was made the claimants' representative asked that deliveries if possible should be expedited, and the respondents' representative, while giving no undertaking, promised to do this if it were possible. Then on November 6 the contract in question was made, providing for equal monthly deliveries between April 1 and December 31, 1936. In April, 1936, while deliveries under the October contract were still being made, and deliveries under the subsequent contract were due to begin, the representatives of the parties met and discussed the situation. Deliveries under the October contract had not been expedited, so that from April to June, 1936, deliveries under both contracts would be due to be made and received.

The representatives came to what the arbitrator refers to as a verbal agreement that deliveries under the later contract should not begin until the deliveries under the former had finished, and that the deliveries should proceed and the coal undelivered under the later contract on December 31 should thereafter be delivered to the claimants under the later contract. But he does not find that the balance should be delivered in monthly or any instalments, finding, as I understand the case, that there was no agreement on this point. This agreement he finds was for the mutual convenience of the parties, and was so considered by them,

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convenient for the buyers, as their customers had no great amount of storage room, and for the sellers because they were considering closing down one of their pits, in which case it would have been difficult for them to keep up double deliveries, and accordingly no deliveries were made under the later contract till July.

But on December 1, 1936, the sellers wrote to the effect that as the buyers had not taken delivery in accordance with the terms of the contract of November 6, 1935, they declined to deliver any coal after December 31. The buyers claim damages for non-delivery, and the arbitrator has found that as the agreement come to in April, 1936, for postponing delivery was not in writing, s. 4 of the Sale of Goods Act is an answer to this claim, and has awarded, subject to this case, that nothing is due by way of damages. He has also awarded that the buyers cannot claim specific performance of the contract, and that finding is not challenged, as of course coal could have been bought elsewhere, though at a higher price.

Mr. Miller for the claimants, the buyers, took three points: first, that on the findings of what took place in April, 1936, there was not a new contract, but only a postponement of delivery, and that the contract remained in operation subject to a modification as to delivery. Secondly, that if there was a new contract it was not one for sale of goods, but for the delivery of goods already sold. Thirdly, that alternatively, if there was a new contract in April, it had been partly performed by the deliveries that were made between July, 1936—when deliveries of the 70,000 tons began—and December, 1936, and therefore the provisions of s. 4 are satisfied.

The first two contentions can, I think, be dealt with together, and on this part of the case a large number of cases were cited by either side, those most discussed being *Stead* v. *Dawber* (1); *Tyers* v. *Rosedale and Ferryhill Iron Co.* (2); *Leather Cloth Co.* v. *Hieronimus* (3); *Hickman* v. *Haynes* (4); *Plevins* v. *Downing* (5); *Morris* v. *Baron & Co.* (6)

(1) 10 Ad. & E. 57.

(2) L. R. 8 Ex. 305; L. R. 10 Ex. 195.

(3) (1875) L. R. 10 Q. B. 140.

(4) L. R. 10 C. P. 598.

(5) 1 C. P. D. 220.

(6) [1918] A. C. 1.

It often happens when either the 4th or the 17th section of the Statute of Frauds, now replaced by s. 4 of the Sale of Goods Act, 1893, has to be considered that the cases are found to be somewhat difficult of reconciliation, and this case is no exception. In *Stead* v. *Dawber* (1), the Court found it difficult to reconcile *Goss* v. *Lord Nugent* (2) with *Cuff* v. *Penn* (3), and *Stead* v. *Dawber* (1), though the facts were very similar, had in turn to be distinguished by the Court in *Hickman* v. *Haynes*. (4)

Mr. Miller relied strongly on Martin B.'s judgment in *Tyers* v. *Rosedale and Ferryhill Iron Co.* (5), which was upheld when that case went to the Exchequer Chamber. In that case the plaintiffs had requested the defendants to forbear from delivering certain instalments, and accordingly only partial deliveries were made, and then at the end of the contract period the buyers demanded delivery of the residue. Martin B. in a dissenting judgment held that the original contract had not been terminated, and dealt with the objection that the plaintiffs' right to recover was barred by the 17th section as not being in writing by saying: "It "(that is the variation) was not a contract for the sale of "goods . . . . but a contract respecting the delivery of goods "already sold, which is not within the section at all." However, when that case went to the Exchequer Chamber counsel for the defendants abandoned this point, because, as I understand the case, if writing were required, there was enough to supply a memorandum, and I feel a difficulty in holding that the approval which the Exchequer Chamber gave to the judgment of Martin B., who had differed from the rest of the Court below on the question as to whether the original contract was rescinded, necessarily extended to this part of his judgment.

With all respect to the high authority of the learned Baron, it seems to me that a term as to delivery is a term of the sale, and if that term be altered it is an alteration of the terms of the contract of sale, and this was, I think, the ground of the decision in *Stead* v. *Dawber* (1), which Mr. Naisby contended was conclusive in his favour. *Stead* v. *Dawber* (1) was, however, as I have said, distinguished in *Hickman* v. *Haynes* (2), another case of a verbal request to allow instalments to stand over, where it was held that the Statute was no answer; and in the following year, in *Plevins* v. *Downing* (3), a very similar case, it was decided that it was.

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(1) 10 Ad. & E. 57.
(2) (1833) 5 B. & Ad. 58.
(3) (1813) 1 M. & S. 21.
(4) L. R. 10 C. P. 598.
(5) L. R. 8 Ex. 305, 316, 317; L. R. 10 Ex. 195.

One must therefore try to find the underlying principle which will explain the different results in cases which at first sight appear to be so alike in point of fact. From these two last-cited cases I think it is possible to extract a principle, and it seems to me to be this: If the parties agree to rescind their original contract and to substitute for it a new one, the latter must be evidenced by writing; so, too, if as a matter of contract the parties agree that the terms of the original agreement shall be varied, the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected, and the obligation to deliver and to accept the full contract quantity still continues. This view is supported by the speech of Lord Atkinson in *Morris* v. *Baron & Co.* (4), where he said: "In *Maddison* v. *Alderson* (5) Lord Blackburn said: 'I think it is now finally settled that the "'true construction of the Statute of Frauds, both the 4th "'and the 17th sections, is not to render the contracts "'within them void, still less illegal, but is to render "'the kind of evidence required indispensable when it "'is sought to enforce the contract.' I do not find that "it was ever seriously questioned that this was the true state "of the law as to the 4th section of the Statute of Frauds. "The doubt was as to whether the same rule applied to the "17th section, or whether contracts within it not in writing "where none of the particular matters specified had been

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(1) 10 Ad. & E. 57.
(2) L. R. 10 C. P. 598.
(3) 1 C. P. D. 220.
(4) [1918] A. C. 1, 30.
(5) (1883) 8 App. Cas. 467, 488.

"done were not absolutely void. There is nothing in all "this inconsistent with the well established rule that a "contract which the law requires to be evidenced by writing "cannot be varied by parol." He then cites certain cases, and goes on: "The foundation, I think, on which that rule "rests is that after the agreed variation the contract of the "parties is not the original contract which had been reduced "into writing, but that contract as varied, that of this latter "in its entirety there is no written evidence, and it therefore "cannot in its entirety be enforced. There is a clear distinction, "however, between cases such as these and cases like *Ogle* v. "*Earl Vane* (1), where one party at the request of and for "the convenience of the other forbears to perform the contract "in some particular respect strictly according to its letter. "As, for instance, where one party, bound to deliver goods "sold upon a certain day, at the request of and for the "convenience of the other postpones delivery to a later day. "In such a case the contract is not varied at all, but the "mode and manner of its performance is, for the reasons "mentioned, altered."

It does not appear to me to matter whether the request comes from one side or the other, or whether it is a matter which is convenient to one party or to both. What is of importance is whether it is a mere forbearance or a matter of contract. This I think is made clear by *Plevins* v. *Downing* (2), where Brett J. emphasizes the distinction between the situation where the party suing was always ready and willing to perform his contract and merely abstained at the request of the other party, and where, if he sued for non-acceptance or non-delivery, he would be driven to rely on the assent of the other party to allow him to vary the terms of the original contract.

If, however, one party asks the other if he would refrain from delivering, and the other party says it would suit him very well to do so, both parties being able and willing to perform their obligations, I think we get the same position as is envisaged by *Hickman* v. *Haynes* (1), and by Lord Atkinson in the passage to which I have referred.

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(1) (1867) L. R. 2 Q. B. 275; L. R. 3 Q. B. 272.
(2) 1 C. P. D. 220.

It then has to be determined on which side of the line the present case falls. Mr. Naisby relies on the fact that the arbitrator has found that there was a verbal agreement; but I do not think the use of those words concludes the matter. Whether it be a forbearance or a matter of contract, there is none the less an agreement; there is an agreement between parties, though for want of consideration or because of the provisions of an Act of Parliament their agreement must be regarded as nudum pactum or as void. One must have regard to the facts found by the arbitrator, and when one finds that what happened was a conversation which arose, as it seems to me, because one party had not been able to expedite deliveries under an earlier contract which he had promised, but not undertaken, to do if he could, when one finds that neither party thought the matter worth confirming in writing, and that the vendors' representative did not even inform his directors of the matter, and no inquiry was made or pressure applied during the contract period, I think one is driven to the conclusion that this was no more than a mere forbearance, and voluntary in the sense that either party could have rescinded and called upon the other to make or take delivery in accordance with the terms of the written contract. Accordingly I hold that the Statute is not an answer to the buyers' claim.

This in effect disposes of the case, but I think I ought to deal with Mr. Miller's contention as to part delivery, particularly as I am afraid he thought I did not pay enough attention to it in argument, though in fact it seemed to me an interesting point. He contends that, as deliveries were made after the parties had agreed to the modification, he is entitled to prove the actual contract and rely on the part delivery as taking the case out of s. 4.

But the difficulty in the way of accepting this argument to my mind is this: *Morris* v. *Baron & Co.* (2) has decided that there is a real distinction between varying an existing contract and rescinding a contract and substituting for it a new agreement. If the arbitrator had found, or if the facts had shown, that the parties had rescinded their contract of November 6 and substituted for it a fresh one under which deliveries were not to begin until July, in my opinion Mr. Miller's contention would have been right. But the arbitrator has not found this, and it is, I think, clear that nothing of the sort happened. I think the parties would have been very surprised if they had been told that they had rescinded the contract of November 6, 1935, by the conversation in the following April. Therefore it was under that contract that the part deliveries were made, and if evidence were given that the parties had agreed as a matter of contract that the deliveries should be altered from April/December to July/April, it would have been open to the objection that it was inconsistent with the terms of the written document.

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(1) L. R. 10 C. P. 598.

(2) [1918] A. C. 1.

Had it been a matter of adding a term, so that the agreement was partly written and partly oral, and part deliveries were made thereunder, it would have been different, but it seems to me that what has been found, if it be a matter of contract, contradicts or at least is inconsistent with the document. I do not think, therefore, that part delivery would be an answer to the Statute, if it applied.

Questions Answered.

Solicitors for claimants: *Bentleys, Stokes and Lowless, for Bramwell, Clayton and Clayton, Newcastle-upon-Tyne.*

Solicitors for respondents: *King, Wigg and Brightman, for Wilkinson and Marshall, Newcastle-upon-Tyne.*

F. P. F.

1937
Oct. 27.

THE KING *v.* THE BOARD OF CONTROL, THE CORPORATION OF THE COUNTY BOROUGH OF EAST HAM, AND MORDEY.

Ex parte WINTERFLOOD.

Local government—Mental defective—Order placing defective under guardianship—Expiration of order—Continuance order not sealed till after date of expiration of original order—Validity—Habeas corpus—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 11, *sub-ss.* 1, 2.

By s. 11, sub-s. 1, of the Mental Deficiency Act, 1913: "An order "made under this Act that a defective be sent to an institution "or placed under guardianship shall expire at the end of one year "from its date, unless continued in manner hereinafter provided." A proviso follows under which the next succeeding quarter-day may be substituted for the anniversary as the date on which the order shall expire. Sub-s. 2: "An order shall remain in force "for a year after the date when under the preceding provisions "of this section it would have expired, and thereafter for successive "periods of five years, if at that date and at the end of each period "of one and five years respectively the Board, after considering "[certain special reports and other matters] consider that the "continuance of the order is required in the patient's interests and "make an order for the purpose."

On June 11, 1929, an order under the Act was made in respect of the applicant, expiring on June 24, 1930. On June 23, 1930, a continuance order was made expiring on June 24, 1931. Further purported continuance orders were made on June 29, 1931 (expiring June 24, 1936), and July 6, 1936. On an application for habeas corpus on the ground that the order of July 6, 1936, was invalid (*a*) as being made out of time and (*b*) as purporting to continue the order of 1931, which was itself invalid because it was made out of time:—

Held, that though the intention of the Legislature was that there should be no gaps, the Act must not be construed with unreasonable strictness, and, since the statutory consideration of the reports had taken place at the proper time, the actual sealing of the order might, in the absence of mala fides, take place within a reasonable time thereafter.

Semble, that the detention of a defective person for twelve days after the order for his detention has expired under sub-s. 1 may be a matter to which the maxim "de minimis non curat lex" applies if the Board then makes a continuance order based on reports submitted to the Board in due time.

RULE NISI for habeas corpus.

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On June 11, 1929, an order was made by the Board of Control appointed under the Mental Deficiency Act, 1913 (1), certifying that the applicant, Horace Edward Winterflood, was a defective within the meaning of the Act, and he was sent to a farm colony at Hildenborough, Kent. The Board of Control directed that the order should, unless continued, expire on the quarter-day next after the day on which it would have expired but for that direction—i.e., on June 24, 1930. The order was duly continued by an order of June 23, 1930, based on a special report dated June 3, 1930, and a certificate dated June 5, 1930. This order, which expired on June 24, 1931, was purported to be continued by a further order dated June 29, 1931, based upon a special report dated June 2, 1931, and a certificate dated May 19, 1931, for a further five years expiring on June 24, 1936. It appeared from the affidavits filed on behalf of the Board that on June 24, 1931, the special report and certificate of the medical officer under s. 11, sub-s. 4 (*b*), were referred back to him for amendment, and that in their amended form they reached the Board on July 4, 1931. Finally on July 6, 1936, a further continuance order, based on a special report and certificate both dated May 26, 1936, purported to continue the order for a further five years from June 24, 1936.

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(1) The Mental Deficiency Act, 1913, s. 11, sub-s. 1: "An order "made under this Act that a "defective be sent to an institution "or placed under guardianship "shall expire at the end of one year "from its date, unless continued "in manner hereinafter provided: "Provided that in the case of "any institution the Board may by "order direct that orders that "persons be sent thereto shall, "unless continued as hereinafter "provided, expire on the quarter "day next after the day on which "the orders would have expired "under the above provision."

Sub-s. 2: "An order shall re"main in force for a year after the "date when under the preceding "provisions of this section it "would have expired, and there"after for successive periods of "five years, if at that date and at "the end of each period of one and "five years respectively the Board, "after considering such special "reports and certificate as is "hereinafter mentioned and the "report of any duly qualified "medical practitioner who, at the "request of the defective or his "parent or guardian or any re"lative or friend, has made a "medical examination of the defec"tive and the means of care and "supervision which would be "available if the defective were "discharged consider that the "continuance of the order is "required in his interests and make "an order for the purpose."

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WINTERFLOOD, *Ex parte.*

During the intervening period Winterflood had resided partly at the farm colony at Hildenborough, partly, under licence, with his own relatives. In April, 1936, owing to some trouble which arose, he was taken to an institution at Forest Gate, and thence to Hildenborough again. After some intermediate residence on licence with certain persons at Southall a home was found for him with Mrs. Mordey, the personal respondent to this rule. The rule was obtained on the ground that the continuance order of 1936 was bad in that it purported to continue on July 6, 1936, an order which had expired on June 24, 1936, and also in that it purported to continue an order which was itself invalid for a like reason, having been made on June 29, 1931, when the order which it purported to continue had already expired on June 24, 1931.

Sir Donald Somervell A.-G. and *Valentine Holmes* showing cause for the Board of Control. The real question is the meaning of the words "at that date and at the end of each period of one "and five years respectively" in s. 11, sub-s. 2. By the quarter-days on which the orders expired the Board had taken all proper steps to get in the reports, etc., referred to in the section. The intention of the section is that the Board should give consideration to those reports, through their proper officers. With a very large number of patients under their care it may not always be practicable to complete that consideration on the actual quarter-day and seal the new order. It is enough if the order is sealed in a reasonable time.

[LORD HEWART C.J. The only point is that the seal of the Board was placed upon some of the orders later than the due date, is it not ?]

That is so. The Mental Treatment Act, 1930, provides that the Board may act by a commissioner, and the Board has appointed commissioners to act for it accordingly.

[DU PARCQ J. Do you rely on the argument that the date of the sealing of the order was not the date of the making of the order, or on the argument that s. 11 of the Mental Deficiency Act, 1913, should be given a liberal interpretation?]

We rely more strongly on the latter argument.

H. G. Robertson showing cause for the East Ham Corporation. The essence of habeas corpus is that the writ should be addressed to a person illegally detaining some other person. The Corporation did not detain Winterflood and had no control over him whatever.

[He was stopped.]

Mrs. Mordey did not appear and was not represented.

W. A. L. Raeburn in support of the rule. There is no answer to this rule. Sect. 11, sub-s. 1, says that the order "unless continued as hereinafter provided" *shall expire* on the relevant quarter-day. On June 24, 1931, no continuance order had been made. If, on June 25, Winterflood had insisted on going away, there was no order in force to detain him, for the order had expired under sub-s. 1. He could not thereafter have been retaken on a purported continuance order. The case could not even have been started de novo with a fresh petition, as no grounds then existed to found such petition.

It is important that the power under sub-s. 2 is to "continue" an order, not to "renew" or "revive" it. The word "continue" implies that there shall be no gap between the old and new orders.

With regard to the suggestion that the number of patients is such that it is impracticable to seal all orders on quarter-day, it is submitted that it is not necessary to give so narrow an interpretation to the words "at that date and at the end "of each period." If the orders ought to bear that precise date they could be sealed in advance nunc pro tunc for issue then, but they must at all events be made and sealed before the order which they purport to continue has expired.

The same arguments apply a fortiori to the order of 1936, which was not only out of time itself, but purported to continue an order which was itself a nullity because made out of time.

In the case of the 1931 continuance order, it appears on the face of the affidavits filed on behalf of the Board that the special report and certificate of the medical officer were referred back for amendment on June 24, 1931, and were not received back in their amended form till July 4, 1931.

At the time when the purported continuance order was made on June 29 the Board had not before it, and had not had before it in proper form, the reports on consideration of which the statute empowers them to act. There is no suggestion whatever that the Board or any one else has acted otherwise than in good faith; but where the liberty of the subject is concerned the Act must be strictly interpreted and applied.

LORD HEWART C.J. This is an order nisi for a writ of habeas corpus, to be directed to the Board of Control and to the Corporation of East Ham, directing them to have the body of one Horace Edward Winterflood brought immediately before this Court.

The writ of habeas corpus is, as Lord Watson said in *Barnardo* v. *Ford* (1), "intended to facilitate the release of "persons actually detained in unlawful custody," and the question is whether, upon the materials which are before the Court, the true conclusion is that the person referred to is actually detained in unlawful custody, and, if so, by either or all of the respondents to this rule.

The history of this patient has been clearly explained to the Court. It is a long history, beginning in the year 1929. It is common ground that on June 11, 1929, under the provisions of the Mental Deficiency Act, 1913, an order was made by a Court that the applicant for this rule, then being a defective, should be sent to an institution of the kind referred to in that Act. He was accordingly, and under that order, sent to a farm at Hildenborough, and from that time onwards his history has been traced. In 1930 he was released on licence to live with his parents, as he did for a time. On June 23, 1930, a little before quarter-day, a continuation or continuance order was made, and in the following year, 1931, a continuance order was made on June 29. In 1936, in or about the month of April, trouble arose at Dagenham, where he was then living, and in consequence of what then happened Winterflood was taken to Forest Gate, and thence to the farm at Hildenborough again, where he remained until

(1) [1892] A. C. 326, 333.

June 23, 1936, on which day he was sent on licence to certain persons at Southall. When July 6 came, another continuation or continuance order was made, and in September, 1936, there followed some controversy about money matters, as the result of which he was afterwards taken to Forest Gate again, until on September 25, 1936, a fresh home was found for him with Mrs. Mordey, the person referred to in these proceedings. The detention, therefore, with which we are here concerned is a detention purporting to be under the provisions of the Mental Deficiency Act, 1913, and the question for us is whether it appears that under a purported order made under that statute this applicant for the remedy of habeas corpus is in fact being unlawfully detained.

Our attention has been directed minutely to the relevant provisions of this statute, and the contention really is reducible to the proposition that some of the orders which go to explain the detention of this applicant were not made in due time as provided by the statute, and that therefore they were of no force and the detention of the applicant cannot be justified.

It is quite clear, when one looks at the scheme of this Part of this Act, that the intention of the Legislature was and is that there shall be no gaps. There must be no lacunæ ; there must be continuity, and if there be not continuity, there is automatically release. The provision is that when the order is originally made it operates for a certain time. It is subject to periodical renewals according to circumstances. [His Lordship read the material parts of s. 11.] It is quite clear that that concise sub-s. 2 is dealing very shortly with different circumstances, and it is dealing with them in a compendious phrase. An order shall remain in force after the date when it would have expired for a year, and thereafter for successive periods of five years, if at that date and at the end of each period of one and five years respectively the Board does certain things at that date and at the end of each period respectively.

It is obvious here that we are dealing not with an order for a year ; we are dealing with an order for a period of five years, indeed, with successive periods of five years, and the contention is that some of the later orders, as appears from the dates of the sealing of those orders with the seal of the Board, were not made precisely upon the date which corresponds with the first expiry date. No doubt, as Mr. Raeburn has said, nothing is more important, or few things can be more important, than the liberty of the subject, and where one is dealing with an Act of Parliament providing for the detention of a human being, it is necessary to be strict. But it is not necessary to be unreasonable, and one has to consider what is the reasonable interpretation of these words.

Speaking for myself, I cannot fail to observe that, in dealing in this omnibus fashion with varying circumstances, the words which the statute employs seem to be, perhaps deliberately, vague. The question is: When is the continuation order properly to be made? In the case of an order for a year, it is at the end of the year; in the case of a period of five years, which is this case, it is at the end of that period, if the Board, after considering certain things, considers that the continuance of the order is required in the interests of the patient. Then, without the repetition of the words limited as to date and without the employment of any such word as "thereupon," "immediately," or "forthwith," there follow the words "and "make an order for the purpose." Of course, if there were any indication whatever that there had been any lack of bona fides, or if there were any indication whatever that the further detention was not required in the interests of the patient, one would scrutinize these words very astutely to see if the requirements of the section, on their strictest interpretation, had been fulfilled. There is no suggestion here of lack of good faith. There is not a tittle of evidence that the detention which is complained of is other than detention required in the interests of the patient. All that is said is, that through pressure of work, although all the requisite steps were taken in due time and the relevant conclusion had been arrived at in due time, and on proper grounds, nevertheless the seal of the Board was not actually applied in due time.

The interval was an interval of a few days, something quite inconsiderable.

In that state of the facts I should myself have been prepared to hold that when the maxim "de minimis non curat lex" is applied, the conditions of this section had been fulfilled; but I think that it may be put in an alternative way. When I look at the scope of this sub-section as a whole, and observe the pointed omission of any express provision for the date of the order referred to in the closing words of sub-s. 2, I am prepared to hold that it is enough if the order is made within a reasonable time, always provided that the consideration of the reports and the conclusion formed upon them had been made in the time stated. In the interests of the patient it seems to me it is no less important that those matters should be dealt with as late as possible than it is that they should be dealt with as early as may be.

We know from the documents in this case that those who have the grave responsibility of attending to the administration of this Act have to deal with not hundreds, but thousands of cases, yet it would not be right, for the sake of kindliness, to undertake the investigation of a particular case a considerable time before the crucial date was going to arrive, for the reason that in the interval which might then elapse there might be such a change in the condition of the patient as to render the conclusion arrived at not so much nugatory as unfair. It is vital, therefore, that the consideration should be at the appropriate time, and where we are dealing with a five-year period it should be at the end of the period. When that condition is fulfilled, it seems to me that the requirement of this statute is satisfied if within a reasonable time after that time the order is made. Whether the section be construed in the one way or in the other, I see no materials here upon which we could reasonably found a conclusion that the detention of this unfortunate patient, a detention solely dictated by his own interests, is in any sense unlawful. I think, therefore, that this rule ought to be discharged.

HUMPHREYS J. This is a case which involves a question

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of the liberty of the subject, and that being so, as my Lord has observed, it becomes at once one of importance, because the Courts have always been assiduous to preserve, as far as may be, the liberty of the subject.

Mr. Raeburn asks this Court to say that the unfortunate person, the subject of the application, is now unlawfully detained, and it appears that he is detained at the moment in a place provided under the Mental Deficiency Acts, 1913 and 1927, by virtue of an order made on July 6, 1936. That order runs as follows: "The Board of Control having considered the requisite reports and certificate with regard to "the above-named patient and the means of care and supervision which would be available if he was discharged, and "being satisfied that the continuance of the above order is "required in his interest, hereby orders the same to be "continued for five years from June 24, 1936. The common "seal of the Board of Control was hereunto affixed this 6th "day of July, 1936." Mr. Raeburn says that that order, which was a continuance of an order originally made on June 11, 1929, is a bad order on the face of it. As I understand, he says so for two reasons. He says, first of all, that that order was itself not made in accordance with the terms of the section, which permits the making of such a continuance order, that is s. 11 of the Mental Deficiency Act, 1913. The second reason is that the order can only be good, he says, if it is a continuance of a valid order, and in truth it is a continuance of an order made on June 29, 1931, which itself was invalid. Perhaps the strongest way in which Mr. Raeburn's case could be put is by the production (and he has referred us to it) of the order which was sealed on June 29, 1931, and upon the face of which it appears that the original order was dated June 11, 1929, and that the date at which the order, which was the effective order detaining this person, will expire, if not continued, is June 24, 1931. Then the only other date which appears is the date of June 29, 1931, which purports to continue something which Mr. Raeburn says, on the face of it, has expired five days before. I find that a very attractive argument on the face of it. If it be essential that one order which expires on some particular day should be renewed before that day has arrived, I should find it difficult to agree with an argument that it does not matter. Mr. Raeburn enforced his argument by a reference to s. 11, and it is when one looks at s. 11 that I think the weakness of his position is exposed. He says: "Looking at s. 11, there "are these direct words, these imperative words, that an order "shall remain in force for one year; and assuming—I am not "now quoting the Act; I am merely paraphrasing it—by "virtue of a certain provision that order can remain, and does "remain, in force till the quarter-day following the expiry, "then that order cannot possibly be effective after that quarter-"day." Then he says, by sub-s. 2 it is provided that an order shall remain in force for a year after the date when it would, under the general provisions of this section, have expired and thereafter for successive periods of five years, if at that date—that means, if at some time within the twenty-four hours indicated by some particular date, which in this case was June 24, 1931—certain things are done; and he says they must be done on that day. He was disposed to say at one time that none of them must be done before that date, but I do not think he seriously, on consideration, pressed that upon the Court, because it would seem that, if that were so, an impossible task would be placed upon persons who, however eminent, are only human. It would require that there should be, I should think, almost hundreds of persons sitting simultaneously, inasmuch as we are told that a great many of these orders are made to expire on quarter-days, considering reports which they are required to consider, and certificates which they are required to consider, making up their minds, and actually sealing the documents all on one particular day. But what I think Mr. Raeburn eventually agreed was a more reasonable way of looking at the section was that which he asked us eventually to say was the correct way—namely, that assuming the Board might be permitted to consider the reports and certificates and take the matter into their general consideration before the important day indicated by the words "that date," yet the order in question, the order of

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continuance, must be made upon that date. For my own part, I am quite content to assume, and I think I can go so far as to say I would hold, that in such a document as this the date when the order is made must be taken to be the date when it is sealed. Any other rule would lead to great inconvenience. It would enable persons to bring evidence as to when a particular document was in fact sealed or made, although it bore a seal which purported to be affixed on a particular date. Therefore, I assume that this order of continuance came into existence on June 29, 1931, the date when it purports to have been sealed. I confess that the more I look at sub-s. 2 of s. 11 the more I am impressed by—if I may use the word my Lord has used—the vagueness of it. The impression upon my mind is that, so far from Parliament having been imperative as to the importance of the particular day, Parliament has merely indicated that where an order is made it shall last for a year, or in certain circumstances a year and the remaining days up to the next quarter-day, that then the person shall not be detained further without a continuance order, and that that continuance order shall not be made without the most careful examination of every relevant fact which might lead the Board to think that that person might be restored to liberty. There are directions that the Board shall consider various matters, and those various matters are referred to in sub-s. 4 of the section, being special reports of different descriptions. Then when the Board has done that, it is to consider. That means something in the case of a person who is a mental defective ; it does not mean they are to act as soon as they find that somebody has said something which justifies them in acting. They are to consider, and I have no doubt whatever that the Court ought to assume that in this case they considered carefully and fairly whether, having regard to all those circumstances, it was necessary in the interests of the patient, as well as the public, that a continuance order should be made. It is quite immaterial, so far as the interests of the patient are concerned, whether they actually register that decision on that day or a few days later, so long as, it seems to me, they do it without undue delay, or without unreasonable delay, and that they do it bona fide, which is not in dispute in this case. I am fortified in that conclusion by the words of the sub-section, which, after using the words "after "the date" merely to indicate the first year, uses that curiously vague phrase "at the end of each period of one and "five years respectively," words which I think Parliament would never have used if it had been intended to make an imperative order that something should be done upon a particular day and not afterwards.

For those general reasons, agreeing as I do entirely with every word which has fallen from my Lord in his judgment, I think that this rule must be discharged.

DU PARCQ J. I agree. The words which we have to consider, so far as this case is concerned, read in their context, are the words: "at the end of each period of one and five "years." I say that because Mr. Raeburn said he did not press the point which he made about the only order to which the words "at that date" can have any application. When one looks at the whole of this section, it is plain that the Board have to come to a conclusion upon the question, whether the continuance of the order is required in the interests of the patient, that is to say, the continuance of the order beyond the date at which it would expire, unless they make an order to the contrary. They cannot possibly come to a conclusion upon that point without considering information which relates to that particular date, that is to say, the end of the period when he would be entitled to be released but for some order by them. They have not to consider the question whether he has been properly detained so far, or restrained so far, but whether it is proper or not to continue to restrain him. They must, therefore, take into consideration reports which bring their information up to the end of that period, and they cannot consider those reports and come to a conclusion and make an order within the terms of this section, unless some reasonable time is allowed to them in which to consider and make their order. It appears to me, therefore, that we should be compelling the Board to do something which is

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du Parcq J.

impossible, or to do their work very badly, if we were to say that they must in all cases come to their conclusion and make their order on the very day, with regard to which they have to make up their minds whether it is proper then to say that the patient ought still for the future to be restrained.

I think, therefore, that the interpretation which my Lord and my brother Humphreys have put upon this section is the only interpretation which ought to commend itself to this Court, and I agree that the rule should be discharged.

Rule discharged.

Solicitor for the Board of Control: *Solicitor, Ministry of Health.*

Solicitor for the East Ham Corporation: *F. D. Littlewood.*

Solicitors supporting the rule: *E. A. R. Llewellyn & Co.*

J. W. H.

MORGAN *v.* TARENI COLLIERY COMPANY, LIMITED.

C. A.
1937
Nov. 9, 10, 29.

Workmen's Compensation—Amount of Compensation—Average weekly earnings—Reduction in earnings during preceding year owing to spread-over system of employment—Computation of Compensation—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 2 ; *s.* 10, *sub-s.* 1.

A collier was certified to be partially disabled by the industrial disease of silicosis as from February 14, 1933, and later to be totally incapacitated. During the 12 months preceding the disablement work had been slack at the colliery and during part of the time a spread-over system was instituted with the consent of the senior workmen in the colliery, who otherwise would have been in continuous employment under a seniority rule which gave them a preference in employment. As the result of the spread-over the collier, who was a senior workman, was employed during its continuance at first for one week in three and later for alternate weeks. For the purpose of computing his compensation it was necessary to ascertain his average weekly earnings during the 12 months preceding his disablement :—

Held, that the spread-over system regulated the conditions of the workman's employment and determined the wages he could earn during its continuance. The weeks of enforced idleness could not be disregarded and the average weekly earnings during the 12 months must be ascertained by dividing his total earnings for the year by 52.

Anslow v. *Cannock Chase Colliery Co.* [1909] 1 K. B. 352 ; [1909] A. C. 435 applied.

APPEAL from an award of Judge Clark Williams sitting at the Neath and Port Talbot County Court as arbitrator under the Workmen's Compensation Act, 1925.

Richard Morgan was a workman employed as a coal cutter by the Tareni Colliery Co., Ld. in their colliery. On June 3, 1933, it was certified that he was suffering from silicosis, an industrial disease, to such a degree that, though not totally disabled, it made it dangerous for him to continue to work, and he was suspended as from February 14, 1933. Later he was certified to be totally incapacitated as from March 17, 1936. On April 1, 1937, the workman brought proceedings claiming compensation as from February 14, 1933, on the ground that his incapacity from silicosis was due to the work on which he was employed. The workman alleged that his average weekly earnings during the year preceding his

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suspension were 3*l*. 6*s*. 2*d*., but the employers contended that they were only 2*l*. 3*s*. 10*d*., and further that from February 14, 1933, to March 17, 1936, the workman was not disabled from working and earning wages equal to 1*l*. 17*s*. 6*d*. a week. They submitted to an award of 29*l*. 15*s*. 3*d*. being the compensation calculated on this footing for the period of partial incapacity and to an award of 1*l*. 3*s*. 5*d*. a week as from March 17, 1936.

The only question was as to the amount of the workman's average weekly earning before he was suspended from employment, and in this connection evidence was given at the hearing before the county court judge that before June or July, 1932, there had been a slack time for work in the colliery, but that the workman as a senior man in the employment of the colliery-owners had continued in full work under a seniority rule in the colliery, a well-known arrangement in the anthracite area, by which the junior men were the first in their respective grades to be withdrawn from work. In June or July, 1932, the men were told that a big customer was closing and the colliery-owners suggested that two districts should be stopped and one only worked and that the men should agree to share the work so as to avoid the withdrawal of any men. As the result of a ballot the seniority rule was waived for the time being in order to give everyone one day's work in three. As a result of this arrangement the workmen worked for one week in three until October, 1932, and one week in two until December 17, 1932, when full time was resumed. The average weekly earnings for the year preceding the disablement were 2*l*. 3*s*. 10*d*. if the actual earnings of the workman were divided by 52, but the workman contended that he ought not to be penalized by the voluntary arrangement for a spread-over.

The county court judge said he assessed the mean working capacity of the man from February 14, 1933, to March 17, 1936, at 15*s*. a week. On the question of the computation of his average weekly earnings before disablement, he felt bound to hold that although the workman, with the other senior workmen, voluntarily agreed to the arrangement by which they shared the available work with the other workmen, yet the arrangement became thereafter a normal and recognized incident of his employment with a consequent diminution of the wages he was able to earn. When once the arrangement was entered into, it ceased to be voluntary, in that it was no longer in the workman's power to elect whether he would work regularly or intermittently. The arrangement governed his employment thereafter and formed part of the conditions prevailing before and up to the time of the disablement which determined what he could earn. He therefore held the average weekly wages to be 2*l*. 3*s*. 10*d*. a week only and accordingly made an award in favour of the workman of 15*s*. 4*d*. a week from February 14, 1933, to March 17, 1936, and thereafter of 1*l*. 3*s*. 5*d*. a week down to the date of the order and thereafter to continue.

The workman appealed. The appeal was heard on November 9 and 10 and judgment given on November 29, 1937.

The only question on appeal was in regard to the matter of computing the workman's average weekly earnings.

J. Alun Pugh (*Anthony Ward* with him) for the appellant. The county court judge has adopted a wrong principle in computing the average weekly earnings of the workman during the 12 months preceding his disablement. This calculation is necessary for the purpose of determining the weekly compensation of the workman under ss. 9 and 10 of the Workmen's Compensation Act, 1925. The fact that the workman joined with the other senior workmen in giving up voluntarily two weeks' employment in three for the benefit of the junior workmen must not be treated as reducing the average weekly earnings. The period of the spread-over was an exceptional period and it should be treated as an abnormal incident and a voluntary abstention from work for the good of the other colliers. This period should therefore be excluded in ascertaining the average weekly earnings and the earnings in the rest of the year be taken and divided by the number of weeks to which regard is given. The respondents, however, contended that the depression causing the shortage of work was not exceptional, and that, although full employment was given up at the start voluntarily, when once the spread-over had started it became compulsory and an incident of the employment. Such a view would cause the workman to suffer for the rest of his life, and it would involve an inferior workman who became incapacitated later on receiving higher compensation, for on that view the workman's average weekly earnings were only *2l.* 3*s.* 10*d.* instead of 3*l.* 6*s.* 2*d.*

It is not understood why the county court judge held that the spread-over ceased to be voluntary. The senior workmen could have elected to go back to the seniority rule. The principle laid down in *Perry* v. *Wright* (1) and *Anslow* v. *Cannock Chase Colliery Co.* (2) applies here. By s. 10, sub-s. 1, of the Act average weekly earnings are to be computed in the manner best calculated "to give the rate per week at which "the workman was being remunerated," and in *Perry* v. *Wright* (1) Fletcher Moulton L.J. points out that this involves the duty of finding out the remuneration received in a normal week. The spread-over for a limited time was not a normal element of the employment. The fair course is to disregard that period. The weeks of work lost through the spread-over are equivalent to weeks of voluntary absence from work; compare *Carter* v. *John Lang & Sons.* (3) On the general principle revealed by the authorities cited the case should be sent back to the county court judge for him to reconsider it on the view that the spread-over was an abnormal period to be disregarded in computing the average weekly earnings: see also *Bailey* v. *Kenworthy*. (4)

W. Shakespeare for the respondents. The appellants' claim is really to take into account earnings in good weeks and not in bad weeks. There is no ground for saying that the slack periods are abnormal. It is true that there was a voluntary arrangement among the senior men to give the junior men part of the available work; but the position, when once the arrangement was made, was the same as if in the weeks when the workman had no work there was no work to be done. By consenting to the spread-over the senior men were saying

(1) [1908] 1 K. B. 441.

(2) [1909] A. C. 435.

(3) (1908) 1 B. W. C. C. 379.

(4) [1908] 1 K. B. 441, 466.

that so far as they were concerned the pit was to be deemed to be closed for periods of two weeks in every three and then in alternate weeks. But there is no authority for disregarding the period of the spread-over. Here there was no break in the employment. The Act contemplates a calculation of the average weekly earnings over a period of continuous employment, but if a man is absent from work for a time it is for the county court judge to say whether that period constituted a break in the employment so that when the man resumed work it was under a new contract of service. If so, the period since the break can alone be taken into account as the last period of continuous employment: *Jones* v. *Ocean Coal Co.* (1); *Scott* v. *Summerlee Iron Co.* (2) The county court judge can bring into play his general knowledge of the conditions of labour. During the period in question labour in South Wales was in a shockingly depressed state, so that it was right to say that this was a normal condition of the trade. Regard, then, must be had to periods of unemployment in calculating the average weekly earnings. The appeal must therefore fail.

J. Alun Pugh replied.

Cur. adv. vult.

1937. Nov. 29. SIR WILFRID GREENE M.R. The judgment which I am about to read is the judgment of the Court [SIR WILFRID GREENE M.R., ROMER and MACKINNON L.JJ. His Lordship then stated the facts and continued :] If the seniority rule had been adhered to the appellant and other senior men would have been in continuous work during the whole period, and the junior men would have had no work at all. It is not clear from the evidence, nor does the arbitrator find, whether the inception of the spread-over system or its continuance was due entirely to the loss of the customer, or in part to that loss and in part to the general depression which had affected the colliery during the first half of the year 1932.

The arbitrator, for the purposes of his award, took the appellant's actual earnings during the 12 months and calculated the average therefrom by dividing the aggregate earnings by 52.

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(1) [1899] 2 Q. B. 124.

(2) [1931] A. C. 37.

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The appellant claims that, inasmuch as he would have been in full work throughout the 12 months if the seniority rule had not been suspended, he ought not to be penalized by what was a voluntary arrangement entered into by himself and other senior men for the benefit of their fellow-workmen. His case is put in two ways. First, it is said that in arriving at his total weekly earnings he ought to be treated as having earned the wages which he would have earned if the seniority rule had not been suspended—in other words, that he ought to be treated as having voluntarily surrendered part of his wages to the junior men. Alternatively, it is said that the spread-over period ought to be treated as an abnormal period and excluded altogether in calculating his average weekly earnings.

Before discussing these contentions we must refer to the relevant provisions of the Workmen's Compensation Act, 1925, and to certain cases in which they have been considered.

By s. 9, sub-s. 2, the workman's weekly payment is (subject to a provision not material to be here stated) to be a sum not exceeding 50 per cent. of his average weekly earnings during the previous 12 months, if he has been so long employed by the same employer, but if not, then for any less period during which he has been in the employment of the same employer. Sect. 10 (i.), so far as material, provides as follows: "Average "weekly earnings shall be computed in such manner as is "best calculated to give the rate per week at which the workman "was being remunerated."

To quote the words of Fletcher Moulton L.J. in *Perry* v. *Wright* (1): "This rule expresses, to my mind, the dominant "note of this part of the schedule. It imposes on the Court "the duty of ascertaining what remuneration the workman "would receive in a normal week in the employment in which "he was engaged at the time of the accident, and gives it "freedom to do so in the manner best calculated to arrive at a "fair result."

The object of the computation is to ascertain the rate per week at which the workman was being remunerated. The word "rate" has an important significance and must be read in conjunction with the direction that the average weekly earnings to be regarded are those earned during the previous 12 months, or lesser period, as the case may be. In the simple case of a workman working for the whole 52 weeks at, say, 3*l.* a week, the rate at which he is remunerated is 3*l.* a week. If his wages vary week by week, the rate, ascertained by reference to his average weekly earnings, will be his aggregate earnings for the 52 weeks divided by 52. But if, while remaining in the same employment, he, for some reason, earns no wages during one or more weeks during the year, more complicated questions arise. He may, for instance, be absent for a fortnight owing to ill-health. The fact that during that period he earns no wages does not affect the rate of his remuneration, and, accordingly, the correct method of calculation will be to divide his aggregate wages earned during his 50 weeks of work by 50, and not by 52 : *Carter* v. *John Lang & Sons* (1) ; *Anslow* v. *Cannock Chase Colliery Co.* (2) It was considered by Fletcher Moulton L.J. that the same principle would apply in the case of stoppages due to breakdowns at the works which were not "normal and recognized incidents" of the employment : *Bailey* v. *Kenworthy.* (3)

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(1) [1908] 1 K. B. 441, 456.

On the other hand, the failure to earn wages during a particular period may be due to such a cause that it does in truth affect the rate of remuneration. If, for example, in a particular employment there is a fixed and recognized holiday during which the men do not work, such as wakes week, the rate at which the workmen in that employment are remunerated must be arrived at by treating the wages earned during their weeks of work as spread over the whole of the 52 weeks of the year. As Fletcher Moulton L.J. said in *Perry* v. *Wright* (4) : "The enforced idleness of these periods is an incident of the "employment of such workman. . . . The wages earned by "such workman in the year are represented by 50 times 2*l.*, "and not by 52 times 2*l.*, and the employer has a right to "claim that this shall be recognized in calculating the average "weekly earnings just as much as any other lack of continuity

(1) 1 B. W. C. C. 379.
(2) [1909] 1 K. B. 352 ; [1909] A. C. 435.
(3) [1908] 1 K. B. 441, 466.
(4) [1908] 1 K. B. 441, 461.

"in employment which is inherent in the employment itself." The same principle was applied in *Anslow* v. *Cannock Chase Colliery Co.* (1), to the case of a stoppage of work which lasted for 14 weeks. In that case Lord Cozens-Hardy M.R. stated the test to be (2): "What were his earnings in a normal week, "regard being had to the known and recognized incidents of "the employment?" This decision was affirmed by the House of Lords, who approved of the test laid down by Lord Cozens-Hardy. Lord Loreburn said (3): "If he [the workman] takes "a holiday and forfeits his wages for a month, then that does "not interfere with what he can earn. It is only that for a "month he did not choose to earn. . . . But if it is part of the "employment to stop for a month in each year, then he cannot "earn wages in that time in that employment, and his capacity "to earn is less over the year."

We now return to the arguments put forward by the appellant on this appeal. The first argument—namely, that he ought to be treated as having earned the wages which he would have earned if the seniority rule had not been suspended, really requires no answer. It would involve treating the workman as having earned wages which he did not in fact earn, and, as a corollary, it would involve treating the junior workmen as not having earned wages which they did in fact earn.

But the second argument is a more plausible one. It is said that upon the principles which were laid down in the authorities to which I have referred, the spread-over period ought to be treated upon the same basis as a period of illness or an abnormal stoppage of the kind referred to by Fletcher Moulton L.J. in *Bailey* v. *Kenworthy*. (4) The effect of this would be that the two weeks in three and (later) the one week in two during which the appellant did not work would be excluded from the average computation.

As in the case of the first argument, it would be necessary, upon this principle, to treat the junior men, who would not have earned wages but for the spread-over arrangement, as having earned no wages at all during the spread-over period.

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(1) [1909] 1 K. B. 352; [1909] A. C. 435.
(2) [1909] 1 K. B. 355.
(3) [1909] A. C. 437.
(4) [1908] 1 K. B. 441, 466.

This result Mr. Pugh, on behalf of the appellant, accepted as inevitable, but he contended that it did not necessarily affect the soundness of his argument. Nevertheless, it is difficult to see how a method of calculation leading to a result so unfair to the junior workmen can be correct.

In our opinion, the conclusion of the arbitrator, who decided against the appellant's contention, was right. The conditions of the appellant's employment during the spread-over period were fixed by the arrangement made between the employers and the men. As soon as this arrangement was made the terms on which the appellant was employed were that he should work, at first one week in three, and later one week in two, and his employment became in its essence intermittent. It was not possible for him to earn more wages during the period than he did, and once the arrangement was made his periods of enforced idleness were, in our opinion, on exactly the same footing as the period of stoppage dealt with in *Anslow* v. *Cannock Chase Colliery Co.* (1) It is true that the arrangement on the part of the men was voluntary in its inception, but, once made, it regulated the terms of employment of all the men and determined the wages which they could earn. On exactly the same principles the average weekly earnings of a junior workman would be ascertained by including in the calculation the wages earned by him during the spread-over period, since it was a term of his employment that he should be entitled to do the work which would earn for him those wages.

The result is one involving some hardship upon the appellant, but we can see no ground in principle upon which his claim can be supported.

The appeal must be dismissed, with costs.

Leave to appeal to the House of Lords was granted.

Solicitors: *J. T. Lewis & Woods, for Randell, Saunders & Randell, Swansea; Furniss, Stephen & Co., for A. J. Prosser, Cardiff.*

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(1) [1909] A. C. 435.

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Landlord and Tenant—Rent Restriction—Controlled rooms in a dwelling-house—Occupation by a trespasser until let to him—"Actual "possession" of landlord—Decontrol—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-ss.* 1, 3.

On the death of the tenant of controlled premises after the passing of the Rent and Mortgage Interest Restrictions Act, 1923, a trespasser went into occupation of the premises until they were let to him by the landlord :—

Held, that the landlord had never come into " actual possession " of the premises under s. 2, sub-ss. 1 and 3, of the Act so as to render them decontrolled premises. During the occupation of the premises by the trespasser the landlord was entitled to possession but was not in " actual possession " of the premises.

A dictum of Scrutton L.J. in *Goudge* v. *Broughton* [1929] 1 K. B. 103, 130, considered and explained.

APPEAL from Deputy Judge Rees sitting at the Lambeth county court.

Mrs. French was, until her death in September, 1931, the tenant of No. 27, Beresford Street, Walworth, and many years before had sublet two rooms to the defendant, and, on a third room becoming vacant, had sublet to him the three rooms. Mrs. French had been the occupier of another two rooms and on her death the defendant took possession of these, but without any tenancy agreement. Later the landlord's agent called at the house to collect rents and finding the defendant in possession of the two rooms said that he was a trespasser, but offered to let him the whole five rooms at a rent of 22*s*. 6*d*. a week. The defendant accepted this offer and for some years and up to October, 1936, paid this rent. He then stopped payment, as he considered that the five rooms were all controlled premises under the Rent Restriction Acts and that he had been paying more than the proper rent. The plaintiff, who had become the landlord of the whole house, gave the defendant notice to quit, which expired on December 21, 1936, and on February 12, 1937, commenced proceedings, claiming possession on the ground of non-payment of rent, arrears of rent and mesne profits.

The county court judge thought the three rooms first taken were and still remained controlled, but that the other two rooms had become decontrolled on the death of Mrs. French. He was of opinion that on the death of Mrs. French possession reverted to the plaintiff and that the defendant, having entered into occupation of rooms without any consent, and not under any agreement, was a trespasser in respect of these two rooms. The statutory tenancy of the three rooms was at a rent of 12*s*. a week and was unaffected. The later agreement must be taken to mean that 10*s*. 6*d*. a week was being paid for the two rooms.

The plaintiff then obtained leave to amend his proceedings so as to claim possession of the two rooms only and an order was made for possession and judgment given for 18*l*. 10*s*. arrears of rent and mesne profits.

The defendant appealed. The appeal was heard on November 18, 1937.

J. Scott Henderson for the appellant. The county court judge was wrong in holding that the two rooms were decontrolled under the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, by reason of their having come into possession of the landlord since the Act came into force. By s. 2, sub-s. 3, "possession" in sub-s. 1 means "actual "possession," and the landlord was never in actual possession of the two rooms during the relevant period. There is no evidence that the landlord went into actual possession. After Mrs. French's death the defendant occupied them as trespasser until the landlord's agent granted him a new tenancy including these two rooms at 22*s*. 6*d*. a week. In the gap between the two tenancies the defendant was in actual possession although he was a trespasser.

Hon. Edward Duke for the respondent. The landlord was in constructive possession during the period that the plaintiff was a trespasser.

[SIR WILFRID GREENE M.R.: That is the very thing that s. 2, sub-s. 3, seems to show is insufficient.]

The appellant acquiesced in the view that he was a trespasser and that means that the landlord was in actual possession during that period: see *Goudge* v. *Broughton* (1), one of a group of cases heard together, and in particular the observations of Scrutton L.J. (2) referring to his own remarks in *Remon* v. *City of London Real Property Co.* (3) This shows that during the period that the defendant was in occupation only as a trespasser the landlord had the actual possession.

[ROMER L.J. If that were so, a trespasser could never acquire a title to property by possession.]

Again, it is a question of fact whether the two rooms were decontrolled, and there was evidence to support the county court judge's finding.

[SIR WILFRID GREENE M.R. It is a question of law whether premises are decontrolled depending on the facts.]

It is contended that the county court judge's decision was right.

J. Scott Henderson in reply. In *Goudge* v. *Broughton* (4) Scrutton L.J. was only pointing out that there must have been a legal tenancy before a statutory tenancy can arise.

SIR WILFRID GREENE M.R. The only point that arises on this appeal is a very short one, depending on the true construction of s. 2 of the Rent Restriction Act, 1923, as applied to the facts of the case. The appeal relates to two rooms in a dwelling-house at Walworth. The learned county court judge held that the other rooms, possession of which was claimed in the action, were still subject to the Rent Restriction Acts. But he also held that the two rooms in question were not so subject, and accordingly made an order for the possession of those rooms, and also an order for the payment of arrears of rent and mesne profits. The facts are very short. The whole house was held by a Mrs. French as tenant. The defendant had occupied two, and later three, rooms in the house. In 1931 Mrs. French died and the defendant took possession of her two rooms. When he first did so it appears that he had no title to go into possession of the rooms at all. When the landlord's agent called later on,

(1) [1929] 1 K. B. 103, 129.
(2) Ibid. 130.
(3) [1921] 1 K. B. 49.
(4) [1929] 1 K. B. 103, 130.

presumably to collect the rent, he said that the defendant was a trespasser, and offered him all the rooms, the rooms he was occupying before plus these two, at a rent of 22*s.* 6*d.* a week, and that offer was accepted.

On these facts the question arises whether those two rooms became subject to the provisions of s. 2 of the Rent and Mortgage Interest Restrictions Act, 1923. That section provides, in sub-s. 1, as follows: "Where the landlord of a dwelling-house "to which the principal Act applies is in possession of the "whole of the dwelling-house at the passing of this Act, or "comes into possession of the whole of the dwelling-house at "any time after the passing of this Act, then from and after "the passing of this Act, or from and after the date when the "landlord subsequently comes into possession, as the case may "be, the principal Act shall cease to apply to the dwelling-"house." The question therefore is whether, subsequently to the passing of the Act, the landlord came into possession of these two rooms within the meaning of s. 2, sub-s. 1. Sub-s. 3 contains the following definition of the expression " possession." "For the purposes of this section, the expression ' possession ' "shall be construed as meaning ' actual possession,' and a "landlord shall not be deemed to have come into possession "by reason only of a change of tenancy made with his consent." I should have thought that the words " actual possession " meant the actual taking of possession by the landlord by his entering himself or by his agent, and that the language of the definition clause was used for the purpose of excluding altogether such things as possession through the receipt of rent. In the present case the position was this: When Mrs. French died and the defendant took possession of the two rooms he was there no doubt as a trespasser. But that did not alter the fact that he had possession of the rooms and the landlord had not. It is a misconception to treat a landlord who is excluded from possession by a trespasser as being himself in possession. He is not. His proper method of procedure, if he wants to eject the trespasser, is to proceed against him for recovery of possession. That is the strict view of the matter. It is quite incorrect to suggest that the possession of a trespasser is the

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possession of the true owner or the person entitled to possession. I cannot myself read the words "actual possession" in s. 2, sub-s. 3, as being intended to produce the result that a landlord can be in possession through a trespasser.

After the arrangement was made with regard to the rent of *22s. 6d.* a week the relationship became that of landlord and tenant. But there was no point of time in the whole of the relevant period at which the landlord came into actual possession of these two rooms. The learned county court judge treated the matter in this way: "I am of opinion," he said, "that upon the death of Mrs. French possession reverted "to the plaintiff, and that the defendant, having entered into "occupation of the rooms without any consent, and not under "any agreement with the plaintiff, was a trespasser in respect "of these two rooms." It may well be that on the death of Mrs. French the plaintiff became entitled to possession. But that is not sufficient according to the terms of the section. The landlord must take actual possession, which he never did. The case relied upon on behalf of the respondent was *Goudge* v. *Broughton* (1), one of a group of cases decided by the Court of Appeal at that time. The particular words that are relied upon are those of Scrutton L.J., at p. 129. That was a case where the plaintiff had bought a cottage in October, 1925, that is to say, after the passing of the Act of 1923. The cottage had been in the occupation of the gardener of the plaintiff's vendor, and of course the possession of this gardener, who was not paying any rent, was the possession of his employer. The result of that was that the plaintiff's predecessor in title had, down to October, 1925, been in actual possession of the cottage. After the plaintiff bought it he allowed the gardener to remain on without paying any rent until December, 1926, when the plaintiff got rid of him—I suppose that that means that he secured his departure—and made a letting to Mrs. Broughton. Afterwards when an attempt was made to recover possession against her she set up a defence under the Rent Restriction Acts.

Now on those facts the first thing to notice is that the

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(1) [1929] 1 K. B. 103.

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predecessor-in-title of the plaintiff had unquestionably been in actual possession subsequent to the date of the passing of the Act, because the possession of the gardener was the possession of his master. But when the plaintiff purchased, the relationship no doubt changed and became that of landlord and tenant-at-will. But the fact remains that there was a possession of the previous owner. The real ground, however, on which the decision appears to have turned was that the plaintiff had been in actual possession, and the Court of Appeal negatived the argument that had found favour with the Divisional Court, which was to the effect that there never was a landlord according to the true construction of the section. Scrutton L.J.'s observations were directed to that. He recalls some observations of his own when he said (1): "In *Remon's* case (2) I said, and I think it has been accepted, "that the decision as to statutory tenants only applies to "cases where there was a previous legal letting and legal "tenancy and does not extend to caretakers, occupiers by "service, and mere trespassers."

At first sight it would look as though those observations were intended to suggest that, for the purposes of s. 2 of the Act of 1923, the landlord must always be treated as being in possession, notwithstanding the fact that a trespasser may be in actual possession of the premises. I do not think that, when the context is examined, Scrutton L.J. intended to say anything of the sort. When *Remon's* case (2) is looked at I think it will be seen that the learned Lord Justice's observations were directed to the question whether a statutory tenancy could be created at all where the relationship between the alleged landlord and the alleged tenant was the relationship of owner and caretaker, who was there on the footing of service, or owner and trespasser. That seems to me to be a point quite remote from the one that we have to deal with here. But if I am wrong in so interpreting the observations of the learned Lord Justice I should like to say that the observation with regard to trespassers, if it was intended to suggest that a landlord has possession through a

(1) [1929] 1 K. B. 130. (2) [1921] 1 K. B. 49.

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trespasser, must have crept in, I cannot help thinking, through some inadvertence, the point not being before the Court. It is to be observed that it is only dictum which is not repeated in either of the other judgments.

I am of the opinion that, on the true construction of the section, the possession of a trespasser is not the possession of the landlord for the purposes of the section, and accordingly I think that the learned county court judge was wrong in finding that these two rooms had lost the protection of the Acts.

ROMER L.J. I agree. The only difficulty in this case is occasioned by that passage in the judgment of Scrutton L.J. in *Goudge* v. *Broughton* (1), to which my lord has referred. There is in that passage a reference to trespassers, and it is not at all plain what the learned Lord Justice meant by it. But it is perfectly plain that Scrutton L.J. could never have intended to hold that possession of land by a trespasser was the possession of the true owner of the land. I agree that the appeal must be allowed.

MACKINNON L.J. I agree.

Appeal allowed.

Solicitors: *Simon, Haynes, Barlas & Ireland; R. C. Monty Hellier.*

H. C. G.

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(1) [1929] 1 K. B. 103.

MURRAY *v.* REDPATH, BROWN AND COMPANY.

C. A.

1937 *Nov.* 18, 19.

Costs—County court—Costs on Scale C—Instructions for brief—Brief fee—Power of county court judge to increase item of costs beyond maximum fixed by Scale—County Court Rules, 1936, *Order* XLVII., *rr.* 1, 2, 13, 21, 24, 30, 42; *Order* L., *r.* 2.

Under the County Court Rules, 1936, no discretion is conferred on the county court judge to increase any item of costs beyond the maximum allowed in the appropriate scale, except when under Order XLVII. express power is given to him to certify for higher costs.

In particular there is no power to increase the amount charged for "instructions to counsel" beyond the maximum scale charge, and the fee for brief to counsel can only be increased beyond the maximum in the scale by a certificate of the county court judge given at the hearing under Order XLVII., r. 21, sub-r. 1.

APPEAL from a decision of His Honour Judge Dumas sitting at the Westminster county court.

James Henry Murray was employed by the defendants as a steel erector, and on May 20, 1936, he met with a fatal accident in the course of his employment. His widow brought proceedings in the county court on behalf of herself and her two daughters claiming damages under the Employers' Liability Act. On March 1, 1937, judgment was given for 600*l.* damages and costs under Scale C, and damages were apportioned as to 400*l.* for the widow and as to 80*l.* and 120*l.* for the daughters respectively.

The plaintiff's solicitors duly carried in a bill of costs for taxation in which the items appeared "Instructions for Brief" 26*l.* 5*s.* and counsel's fee and clerk 11*l.* The registrar of the court only allowed these items at 6*l.* 6*s.* and 8*l.* 13*s.* respectively, these being the maximum amounts allowed for these items under the County Court Rules, 1936, Appendix B, Scale C, and the registrar being of opinion that he had no power to exceed these amounts. The matter was adjourned to the county court judge for review, and he increased the item "Instructions for Brief" to 20 guineas and raised counsel's fee to 10 guineas.

The defendants appealed. The appeal was heard on November 18 and 19, 1937.

Marven Everett for the appellants. The county court judge had no power in the exercise of his discretion to raise the fee for instructions for brief and the brief fee beyond the maximum provided in Class C as set out in Appendix B to the County Court Rules, 1936. These rules came into force on January 1, 1937, but by Order L., r. 2, they are to apply, so far as practicable, to any proceedings pending in a county court on the day on which these rules came into force. Here the proceedings were pending when the rules came into force on January 1, 1937, and there is no reason why they should not apply. The rule as to costs is Order XLVII., and by r. 2 the scales of costs in Appendix B are to have effect in regard to costs of proceedings in the county court "subject to and in "accordance with the rules of the Order and the directions contained in the Scale of Costs." The registrar to the particular court is by r. 3 the taxing officer, and r. 5 provides for the scales of costs, of which the highest is Scale C and applies to a sum of money exceeding 50*l.* There are certain express powers to increase fees beyond the fixed scale, and apart from these there is no discretion either in the registrar or the judge to exceed the maximum scale costs for any particular item. Rule 21 gives the judge power to certify at the hearing that the fee for counsel shall be a larger sum than appears in the scale. Here the county court judge did not avail himself of that power. Rule 24 in terms states that, subject to a special case, which does not apply here, " no "item shall be allowed on taxation between party and party "which is not contained in the Scales." It is under r. 42 that, after the registrar had taxed the costs, and in doing so had felt bound to keep within the limits fixed by Class C, the matter was taken before the judge for a review. Rule 42, sub-r. 3, provides that "on the hearing of the "application the judge may make such order as may be just." That power to review does not give the county court judge power to increase the quantum fixed by the registrar: see *White v. Altrincham Urban District Council* (1); and if he decides that the registrar has acted on a wrong principle, he must send the case back to the registrar to tax on the proper principle.

(1) [1936] 2 K. B. 138.

It is understood that the present appeal, so far as regards counsel's fee, is not resisted seeing that the county court judge did not exercise his power under r. 21 at the hearing. The maximum fixed under item 67 for Class C must therefore be restored.

The limit for instructions for brief is by item 14, Scale C, 1 to 6 guineas, and the amount of 6*l.* 6*s.* fixed by the registrar should be restored. Neither the registrar nor the county court judge has power to exceed the maximum scale fee except in the special cases provided for in the rules, such as r. 21 in regard to counsel's fee and r. 30 as to expert witnesses. There is no such provision as that under Order LIII., r. 8, sub-r. 2, of the earlier rules giving the registrar a discretion to go outside the scales.

Monier-Williams and *Brian Clapham* for the respondents. Order XLVII., r. 42, was designed to give the county court judge a wider discretion. Its effect is to allow a party, when dissatisfied with any items in the taxation of the registrar, to bring them before the county court judge, who can make such order as he thinks fit. In effect then the discretion is transferred from the registrar to the county court judge. It is not as if such cases would arise often ; probably it would only be in cases such as the present, which are in essence High Court cases, though by statute necessarily brought in the county court. Rules 2 and 42 together give the county court judge power to go outside the scales. It is true that the amounts in the scales have been increased in the 1936 rules, but if it was intended to restrict the county court judge in the exercise of his power r. 42 could easily have limited his power to making such order as was just "according to the "rules." Compare rr. 14, 15 and 16. That was done when it was intended to restrict the discretion of the judge, and under r. 42, sub-r. 3, he is free to certify that higher costs should be allowed for particular items. Otherwise it would be difficult to give any meaning to the rule. This is not a case where the registrar was exercising his discretion. He would have wished to give higher costs, but felt bound by the rules. It is contended that the county court judge was not so bound.

Marven Everett replied.

SIR WILFRID GREENE M.R. This appeal raises a question as to the taxation of costs under the new County Court Rules.

The action was an action brought under the Employers' Liability Act and a substantial sum of damages was recovered. When the taxation of the costs took place, questions arose as to two items—instructions for brief and counsel's brief fee. The registrar, who is the taxing officer, held himself to be bound by the figures appearing in the relevant scale and accordingly the sums that he allowed in respect of those two items were 6 guineas for instructions for brief and, disregarding the clerk's fee, 8 guineas for counsel's fee, those being the maximum figures which appear in the scale. The scale in question was Scale C and the item for instructions for brief is item 14, which provides for an allowance of 1 guinea to 6 guineas—those are the limits—and in the case of counsel's fee the item is number 67, where the limits are 3 guineas to 8 guineas. The figures that were carried in on the bill were 25 guineas for instructions for brief and 10 guineas for counsel's fee.

The plaintiff then applied to the judge for a review and the judge increased those fees to 20 guineas for instructions for brief and 10 guineas for counsel's fee. He did so, not on the basis that he was interfering with any discretion as to quantum exercised by the registrar, but upon the basis that the judge has, under the rules, a discretionary power to exceed the limits mentioned in the scale. The learned judge gave leave to appeal and the matter comes to this Court.

The new County Court Rules of 1936 came into force on January 1, 1937; therefore under r. 2 of Order L. the new rules apply, so far as practicable to the case. That rule says :—"These Rules shall apply, so far as practicable, to any "proceedings pending in a county court on the day in which "these Rules come into force." The learned judge took the view that the rules did apply, and it has not been argued before us that they do not apply, and indeed I can see no reason why they should not apply. There is nothing to make their application impracticable.

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The rules which were in force before January 1, 1937, provided for scales of costs which were in general to be adhered to, but under those rules there were provisions by which the scale maximum could be exceeded. For instance, under r. 8, sub-r. 2, of Order LIII., a discretion was given to the registrar, as the taxing officer, to increase the amounts allowed in cases of taxation under columns B and C by a reasonable amount. Rule 23 laid down the principles upon which the discretion should be exercised, and there was a provision for review by the judge.

That, I think, is all that I need refer to in the earlier rules. The principle of them therefore was a range of costs within a minimum and a maximum laid down in the scale, with discretionary power in the registrar to allow a higher sum. It is perhaps worth noticing, with regard to the two items in question in this appeal, that the maximum for instructions for brief under column C under those rules was 3 guineas, and the maximum for counsel's fee under column C was 5 guineas. The maxima, therefore, with regard to those items, and indeed with regard to other items in the scales, have been put up substantially under the new rules.

Under the new rules a different system is adopted, because the discretionary power to increase the figure mentioned in the scale has been taken away. The costs order under the present rules is Order XLVII. Rule 1 provides: "Subject "to the provisions of any Act or Rule, the costs of proceedings "in a county court shall be in the discretion of the court."

Rule 2: "The Scales of Costs in Appendix B shall have "effect for the purpose of regulating the costs of proceedings "in a county court subject to and in accordance with the "Rules of this Order and the directions contained in the Scales "of Costs."

Rule 3: "The registrar shall be the taxing officer of the "court of which he is registrar."

Then rule 5 provides for a lower scale and three higher scales A, B and C.

Rule 13 provides for power in the judge to award costs on such scale as he thinks fit where he certifies that the question

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in dispute was of importance to a class or body of persons or involved a difficult question of law or that the decision of the court affects issues between the parties beyond those directly involved in the proceedings. That discretionary power is not a power to increase the figures mentioned in the scale, but is a power to award costs in an appropriate case on a scale which would not in the ordinary way have been the scale applicable to those proceedings.

Under r. 21, sub-r. 1, there is an express power to the judge, which must be exercised at the hearing, to certify for an increased fee for counsel. It says: "If in any particular "case the judge is satisfied that the fee for counsel ought "not to be limited to the amount appearing in the Scale "and certifies to that effect at the hearing, the fee to be "allowed on taxation shall be such larger sum as the registrar "thinks reasonable." Accordingly there is a power in that case to exceed the scale amount in respect of that particular item.

Then r. 24 says: "Subject to Rule 23 of this Order"—to which it is not necessary to refer for the purpose of this judgment—"no item shall be allowed on taxation between "party and party which is not contained in the Scales."

Rule 30 provides: "(1.) Where a person attends the "court to give in evidence his opinion as an expert witness, "he may be allowed a fee for attending the court, and, in "addition, if allowed by the judge or registrar, a fee for "qualifying to give evidence. (2.) The fee for qualifying "to give evidence shall be such sum as the registrar thinks "reasonable, not being more than 3 guineas, and the fee "for attending the Court shall be such sum as the registrar "thinks reasonable, not being more than 8 guineas nor less "than the sum appearing in Appendix C as compensation "for loss of time for a person of the class to which the expert "witness belongs: Provided that if in any particular case "the judge is satisfied that the fee for qualifying to give "evidence or attending the Court ought not to be so "limited, the fee shall be such sum as the judge directs."

That, therefore, is a case where special provision is made for fees not prescribed in the scale. The normal maximum is laid down, but there is a power in the judge to allow a higher sum.

Then the only other rule to which I need refer is r. 42, which is really the rule upon which the argument was based in this case. It says: "(1.) Any party dissatisfied with "the taxation of any costs by the registrar may apply for a "review of the taxation by the judge." Then sub-r. 2 provides for the time in which the application is to be made and so forth. Sub-r. 3 says: "On the hearing of the application "the judge may make such order as may be just."

Now, leaving that rule aside for a moment, it is clear that in the new rules the old discretion which existed in the registrar to depart from the maxima laid down in the scales has disappeared and the only elements of elasticity in the present system are to be found in those cases where there is an express power given to exceed the stated maximum. One of those cases is the case of counsel's fee which I have mentioned, when a special certificate is required at the hearing; and the other one is the case of expert witnesses.

It appears to me quite clear that there is no general discretion in the registrar to allow a fee beyond the fees laid down in the scales. I apprehend that when the sums allowed were increased, as they have been increased certainly in the cases that we are dealing with, and I doubt not in other cases too, it was thought that there was now a sufficiently wide range within which the registrar could exercise his discretion, and that there was no necessity to give him that further discretion to exceed the specified maxima. In any case, whatever the reason may have been, no such discretion is now given to him.

Then it is said that r. 42 gives a power to the judge on review to do something which the registrar could not have done. That argument is based on the language of sub-r. 3, which I will read again: "On the hearing of the application "the judge may make such Order as may be just." It is said that that gives a general discretion in the judge to allow such fees and costs as he thinks proper irrespective of the maxima laid down in the scale.

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That is an argument which I am quite unable to accept. Rule 42 is a rule dealing with a review of taxation, and in my opinion upon such a review the judge is just as much bound by the figures in the scales as was the registrar himself. The review would, of course, be conducted according to the ordinary principles upon which reviews of taxation are conducted, but the upward limit and the downward limit are prescribed by the scales and the judge has no power on such a review to go outside them.

That that construction of r. 42 is the correct one is, I think, made quite clear, if any further proof of its correctness were needed, by an examination of the old r. 49, which was the rule providing for reviews under the old rules. Rule 49 of Order LIII. provided that any party who might be dissatisfied with the allowance or disallowance by the registrar of any item or part of an item of any costs taxed by him might apply to the judge for review, and the judge might upon such application make such order as he might think just as to the application and the costs thereof.

It is to be noticed that the power to the judge there to make such order as he might think just is precisely the same power as that given in sub-r. 3 of the existing r. 42, and, just as under the old rules that power in the judge did not entitle him to do something outside the limits laid down by those rules, so in the present case r. 42 gives him no such power.

The appeal originally was, as I have said, concerned with those items which I have mentioned, but only one of them is in fact pressed before us. That is the one relating to the instructions for brief. The respondent does not contest the appeal so far as regards counsel's fee, because the view is taken, and I think correctly taken, on his behalf that under r. 21, in the absence of a certificate given at the hearing by the judge, the fee could not be increased. Therefore the appeal really is only concerned with the instructions for brief.

In my opinion, as I have said, the appeal is successful because the learned judge in increasing the fees purported to exercise a power which he had not got. The result therefore is that the item for instructions for brief must be reduced to the amount allowed by the registrar and the item for counsel's fee again must be reduced to that figure.

ROMER L.J. I can well understand the desire of the learned judge to increase the maximum fee allowed by the rules for instructions for brief, because it is plain, I think, that in this case the maximum fee fixed by the scale would provide wholly inadequate remuneration for the solicitor for the work that he has done in that respect ; but I, too, have come to the conclusion, though with great regret, that the learned judge had no power so to increase the fee.

The only rule really upon which the respondent could rely in support of the learned judge's decision is r. 42 which, as my Lord has pointed out, provides that on the hearing of the application to review a taxation the judge may make such order as may be just. In my opinion that rule does not enable the learned judge in this case to increase the fee allowed by the schedule for instructions for brief. The rules fix the remuneration on a scale which the framers of the rules presumably thought was just.

In those circumstances it appears to me hopeless to suppose that the framers of the rules intended that, on the hearing of a summons to review taxation, the learned judge should have a discretion to allow, not a remuneration which the framers of the rules thought just, but such remuneration as he, the learned judge, thinks should be allowed.

In my opinion all that r. 42 means is that on the hearing of a summons to review taxation the learned judge may make an order that he thinks just, having regard to the rules. I agree, therefore, that the appeal must be allowed.

MACKINNON L.J. I agree. I understand that the registrar would have been anxious to increase this item of allowance for instructions for brief if he had not thought himself constrained to refuse to go beyond the 6 guineas fixed by Scale C. The learned judge thought that the amount ought to be 20 guineas, and if it were open to me, as he thought it was

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open to him, to fix the proper amount, I should entirely agree with the learned judge.

The terms of the rules made under the Act of 1934 now appear to be perfectly clear. Whether such a case as this was foreseen by those who drafted the rules it is not for me to speculate, but it is not without materiality, I think, to recollect that this was a claim under the Employers' Liability Act, 1880, and any action under that enactment must be brought in a county court. In this case the claim was concerned with the death of a workman through some disaster to a derrick. It resulted in a judgment of 400*l.* for the widow, 80*l.* for one daughter and 120*l.* for another daughter, 600*l.* in all. It is apparent from the description in the bill of the work done by the solicitors that their task of getting up the case, which is remunerated by the item instructions for brief, was as considerable and as important as in many High Court actions.

The scale under Order XLVII., r. 5, is threefold, A, B and C. Scale A applies to amounts recovered between 10*l.* and 20*l.*; Scale B applies to amounts recovered between 20*l.* and 50*l.*; Scale C applies to amounts recovered over 50*l.* Under Scale B the allowance for instructions for brief is 10*s.* to 3 guineas; under Scale C it is 3 guineas to 6 guineas. It follows that the allowance for instructions for brief may be 6 guineas if the amount recovered is 51*l.* or 52*l.*, but must only be the same 6 guineas if the amount is, as in this case, 600*l.* As I say, I should be glad if the Act and the rules allowed us to affirm the decision of the learned judge. Though I think from the point of view of fairness and reasonableness his was a very proper view to take, I agree that he had no power to do it, and that 6 guineas is fixed by this rule as the maximum allowance that can ever be permitted on this item of remuneration to solicitors for their work in any case in a county court however arduous it may be, and however large the sum recovered.

Appeal allowed.

Solicitors: *Carpenters; Shaen, Roscoe, Massey & Co.*

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STUDEBAKER DISTRIBUTORS, LIMITED *v.* CHARLTON STEAM SHIPPING COMPANY, LIMITED.

1937
Oct. 28;
Nov. 3.

Shipping—Bill of Lading—Shipment of unboxed automobiles—Certificate of surveyor as to stowage—Conclusiveness—Limitation of liability—Agreed value of each "package" shipped—Construction—Harter Act.

In an action for damages for breach of contract and/or duty in and about the carriage of a number of unboxed automobiles in the defendants' steamship from Norfolk, Virginia, to London, the defendants relied on the clauses of the bill of lading, which provided (1.) that a certificate of a surveyor of the Board of Underwriters of New York should be accepted as conclusive evidence that the vessel had been properly prepared for cargo and that the cargo had been properly dunnaged and stowed, and (2.) that the liability of the shipowner for damage to cargo should not exceed the agreed value per packet of 250 dollars, unless a value in excess of such sum had been declared and extra freight agreed on and paid. The bill of lading was expressed to be subject to the terms and provisions of the Act of Congress of the United States, 1893, known as the Harter Act, by s. 1 of which "any clause relieving the shipowner from liability for loss "arising from negligence, fault or failure in proper loading or "stowage" is rendered null and void.

The certificate of the surveyor stated that the steamship had been under his inspection "from time to time during the course "of her loading," and that the stowage, "so far as it came under "the observation of the undersigned, was in accordance with the "rules of the Board of Underwriters."

On points of law, ordered to be tried as a preliminary issue:—

Held, that the certificate of the surveyor was in such guarded terms that it did not satisfy the requirements of the clause of the bill of lading and was not conclusive evidence of proper stowage, so as to preclude the cargo owners from calling evidence in support of their allegations of negligent stowage and unseaworthiness; and, moreover, that the clause itself was inconsistent with the provisions of the Harter Act, because it enabled the shipowner, if he could produce a certificate stating that a surveyor had done that which in fact he had not done, to escape a liability from which the Act intended he should not escape.

Held, further, that the shipowner, by accepting liability up to an agreed value, was not limiting his liability, because it was open to the shipper to declare a higher value and pay a higher freight, and therefore the clause in question was not invalidated by the Harter Act; but that it would be doing violence to the English language to hold that an automobile shipped without a box, crate or any form of covering was a "package," and the clause was inapplicable to such cargo.

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STUDEBAKER DISTRIBUTORS, LD. v. CHARLTON STEAM SHIPPING CO.

TRIAL of preliminary issue.

The plaintiffs, Studebaker Distributors, Ld., claimed against the defendants, Charlton Steam Shipping Company, Ld., for damages for breach of contract and/or duty in and about the carriage of sixty unboxed automobiles from Norfolk, Virginia, to London, in the defendants' steamship *Hollinside.*

By their points of claim the plaintiffs alleged that seven automobiles were delivered crushed, dented and strained by reason of the negligence of the defendants in and about the stowage of the cars. In the alternative they alleged that the ship was unseaworthy. By their defence the shipowners relied on the exceptions in the bill of lading, and also on clause 24 thereof, which agreed the value of each "package" shipped at 250 dollars. The plaintiffs, in reply, contended that the material clauses of the bill of lading were void as being inconsistent with the Harter Act, an Act of Congress of the United States relating to the navigation of vessels, etc., to the terms and provisions of which the bill of lading was expressed to be subject.

The material clauses of the bill of lading were as follows:—

(1.) "It is mutually agreed that if the vessel completes her "loading at this port under the inspection of a surveyor of "the Board of Underwriters of New York and receives the "certificate of such survey certifying that the vessel has "conformed to the rules of the Board of Underwriters of "New York in relation thereto, such certificate issued in the "usual form shall be accepted by the shipper, owner and "consignees of the goods as conclusive evidence that the "vessel has been prepared in every way for cargo, and that "these goods and all other cargo on board have been properly "dunnaged and stowed, notwithstanding such certificate "merely recites that the vessel has completed loading under "such inspection and has conformed to the rules referred to "above."

(24.) "Also, that in the event of claims for . . . . damage "to cargo being made when the steamer reaches her destination, the price shall be the market price at port of destination "on the day of the steamer's entry at the Custom House, less "all charges saved, but it is agreed and understood that the "value of each package shipped hereunder does not exceed "the sum of two hundred and fifty dollars, or its equivalent "in the currency of the country where the vessel discharges, "on which basis the rate of freight is adjusted, and the "carrier's liability shall in no case exceed that sum, unless "a value in excess thereof be especially declared and stated "herein, and such extra freight as may be agreed on "paid. . . . ."

(28.) " Also, that this shipment is subject to all the terms "and provisions of, and to the exemptions from liability "contained in, the Act of Congress of the United States, "approved February 13, 1893, entitled 'An Act relating to "' the Navigation of Vessels,' " etc.

This Act, which is known as the Harter Act, by s. 1, renders null and void "any clause relieving the shipowner from liability "for loss arising from negligence, fault or failure in proper "loading or stowage," etc.

The certificate given by the surveyor of the Board of Underwriters of New York was as follows :—

"This is to certify that the Br. s.s. *Hollinside* . . . . has "been under the inspection of the undersigned at this port "from time to time during the course of her loading ; that "the stowage, so far as it came under the observation of the "undersigned, was in accordance with the rules of the Board "of Underwriters of New York. This certificate is not a "certificate of seaworthiness."

On June 23, 1937, Porter J., in Chambers, ordered that the following points of law be tried as a preliminary issue :—

(1.) The issue of the certificate of James T. Christie, dated April 5, 1935, and the facts therein stated being admitted, whether the said certificate is conclusive that the said automobiles were properly stowed and whether the plaintiffs are precluded from calling evidence (*a*) in support of the allegation contained in para. 4 of the points of claim, that the defendants were negligent in and about the stowage of the said automobiles, (*b*) in support of the allegations contained in para. 5 (unseaworthiness).

(2.) The bill of lading and freight note being admitted, whether the defendants' liability (if any) in respect of each automobile is limited to the equivalent of 250 dollars.

A. J. Hodgson for the plaintiffs. Even assuming that the certificate of the surveyor is a good certificate, clause 1 of the bill of lading is nevertheless null and void under s. 1 of the Harter Act, as purporting to relieve the shipowner of his liability for loss or damage arising from his own negligence or fault. A clause which sets up the standard of a third party is bad, as inconsistent with the Harter Act. Moreover it is a clause inserted by the shipowner and must be construed strictly against him. Even if the clause does not offend against the Act, it nevertheless fails of effect because it has not been complied with. The certificate merely affirms that the vessel has been under the inspection of the surveyor "from time to "time" and that the stowage "so far as it came under the "observation" of the surveyor was in accordance with the rules of the Board. That is not sufficient to satisfy the requirements of the clause. Clause 24 is quite inapplicable to such goods as unboxed automobiles. It is intended to protect the shipowner against unknown liability for the contents of a sealed package, and had no reference to unboxed motor-cars, which can in no conceivable circumstances be described as "packages." Clause 24 seeks to limit the liability of the shipowner and thereby offends against the Harter Act.

J. V. Naisby for the defendants. The certificate of the surveyor is in the usual form and complies with the requirements of clause 1. The object of the clause is to obviate one possible cause of friction between shipper and shipowner before the ship sails. Such an agreement between the parties in no way cuts down the obligation of the shipowner to stow the cargo properly, and does not offend against the Harter Act. All that that Act says is that the shipowner must not contract out of his duty to use proper care (in this case) in the stowage of goods. Such cases as *Australasian United Steam Navigation Co.* v. *Hunt* (1) are distinguishable from this case. They dealt with the limitation of the liability of the shipowner for a breach of the bill of lading, whereas in this case there is merely an agreement as to a fact upon which liability or absence of liability may depend. "Package" is, in my submission, an apt word to describe a motor-car, whether or not it be boxed or crated.

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(1) [1921] 2 A. C. 351.

[GODDARD J. referred to *Whaite* v. *Lancashire & Yorkshire Ry. Co.* (1)]

In that case a wagon, with its contents, sent by rail upon a truck, was held to be "a parcel or package." I submit that a motor-car, with its equipment, although unboxed and not crated, may also be aptly described as a package. As to the effect of the Harter Act upon clause 24, I rest my case on the judgment of Horridge J. in *Anthony Hordern & Sons, Ld.* v. *Commonwealth & Dominion Line, Ld.* (2) I am, of course, not contending that I am relieved of liability for unseaworthiness.

Cur. adv. vult.

1937. Nov. 3. GODDARD J. In this action the plaintiffs claim that, by reason of improper loading or stowage, certain unboxed automobiles shipped by them on the defendants' steamship *Hollinside* were damaged, and there is an alternative allegation that the damage was caused by unseaworthiness. The defendants rely, in their defence, on certain clauses, containing exceptions, in the bill of lading, and by their reply the plaintiffs allege that the clauses in question are void, and rely on s. 1 of the Harter Act, the shipment in question being from Norfolk, Virginia, and the bill of lading having been signed in New York. By an order made in the action on June 23, 1937, it was ordered that two questions, both directed to the validity of the clauses and exceptions relied on by the defendants, should be tried as preliminary points of law.

The bill of lading, as I have said, relates to sixty unboxed automobiles. As required by the law of the United States of America, it is expressed to be subject to all the terms and conditions of the Harter Act, and the first clause that is relied on is clause 1, which reads as follows: "If the vessel "completes her loading at this port under the inspection of "a surveyor of the Board of Underwriters of New York, and "receives the certificate of such survey certifying that the "vessel has conformed to the rules of the Board of Underwriters of New York in relation thereto, such certificate "issued in the usual form shall be accepted by the shipper, "owner and consignees of the goods, as conclusive "evidence that the vessel has been properly prepared in "every way for cargo, and that these goods and all "other cargo on board have been properly dunnaged and "stowed, notwithstanding such certificate merely recites that "the vessel has completed loading under said inspection and "has conformed to the rules referred to above." The certificate which was granted by the surveyor to the Board of Underwriters reads as follows: "This is to certify that "the Br. s.s. *Hollinside*, whereof C. G. Jones is Master, of "2467 Net Tons Measurement, built at Sunderland in 1930, "bound for London, England, has been under the inspection "of the undersigned at this port from time to time during the "course of her loading; that the stowage, so far as it came "under the observation of the undersigned, was in accordance "with the rules of the Board of Underwriters of New York. "This certificate is not a certificate of seaworthiness." Then underneath that is written "Sixty Studebaker Automobiles," and it is signed, "James T. Christie, Surveyor." Then it is stated that the certificate is issued on condition "that while "the officers and committees of the Board use their best "endeavours to insure that the functions of the Board are "properly executed, neither such officers nor such committees, "nor the Board, are under any circumstances whatever to be "held responsible for any inaccuracy in any report or certificate issued by the Board or its surveyors, or for any error "of judgment, default, or negligence of the surveyors or "other employees or representatives of the Board."

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(1) (1874) L. R. 9 Ex. 67.

(2) [1917] 2 K. B. 420, 425, 426.

The plaintiffs contend, firstly, that whether or not this clause offends against the Harter Act, the certificate does not certify in accordance with the terms of the clause, and cannot therefore be relied upon by the defendants as conclusive evidence that the goods were properly stowed. Of course, on an argument of points of law arising on the pleadings no evidence is called, and I accordingly cannot determine whether the certificate is in the usual form, though I have no doubt that it is. But, however that may be, it does not appear to me to be a certificate which satisfies the requirements of clause 1. To satisfy that clause there must be a certificate that the vessel has conformed to the rules of the Board, and is conclusive only if the vessel completes her loading under the inspection of the surveyor, a fact that one would expect to find stated in the certificate. But the document relied on by the defendants seems to be in guarded terms. It certifies that the ship has been under the inspection of the surveyor from time to time, not that she completed her loading under his inspection, and then certifies that the stowage, so far as it came under his observation, was in accordance with the rules of the Board. That, in my opinion, is not enough, and I accordingly hold that the certificate is not conclusive.

This is enough to dispose of the first point, but as the question was fully argued whether this clause offends against the Harter Act, and in case a higher Court should hold that my view as to the scope of the certificate is wrong, I ought to express my opinion on this point also. The Act, which in accordance with English decisions must be regarded as written out in the bill of lading, prohibits, by s. 1, any clause relieving the shipowner from "liability for loss or damage arising from "negligence, fault or failure in proper loading, stowage," etc. In my opinion, the clause does offend against the Act, because it enables the shipowner to escape the liability from which the Act intends he should not escape, if he can produce a surveyor's certificate stating that he has done that which in fact he may not have done. This point has not been previously the subject of express decision. It arose, however, in the case of *Walters* v. *Joseph Rank, Ld.* (1), in 1923, before Bailhache J. The case is reported both in The Times L. R.

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(1) (1923) 39 Times L. R. 255.

1937

STUDEBAKER DISTRIBUTORS, LD. v. CHARLTON STEAM SHIPPING CO.

Goddard J.

and in Lloyd's List Reports. The learned judge certainly gave an opinion, which he expressly stated was only obiter, upon the very point I am now considering. Unfortunately, the two reports flatly contradict one another. In Lloyd's List Reports the judge is reported as saying that he thought the clause was not inconsistent with the Act, and in The Times L. R. that it was. I must say that I prefer The Times report, prepared as it was by a learned and most experienced reporter; but in any case, as the learned judge's view was only an obiter dictum, I am bound to express my own opinion, and it is that the clause is inconsistent with the Act. In any case the certificate could not be pleaded as an answer to the allegation of unseaworthiness, and I cannot decide on this argument whether or not the plaintiffs can make out a case on this head of their claim. The answer to both parts of the first question therefore is in the negative.

The second clause on which reliance is placed by the defendants is clause 24, which deals with the amount for which the shipowner is liable, and again the plaintiffs say that this offends against the Harter Act. The clause reads thus: "Also, that in the event of claims for short delivery "of or damage to cargo being made when the steamer reaches "her destination, the price shall be the market price at port "of destination on the day of the steamer's entry at the "Custom House, less all charges saved, but it is agreed and "understood that the value of each package shipped hereunder "does not exceed the sum of two hundred and fifty dollars, "or its equivalent in the currency of the country where the "vessel discharges, on which basis the rate of freight is "adjusted, and the carrier's liability shall in no case exceed "that sum, unless a value in excess thereof be especially "declared and stated herein, and such extra freight as may "be agreed on paid, nor shall the carrier be liable for "any claim whatsoever unless written notice thereof shall be "given to the carrier before removal of the goods from the "wharf, or from alongside of vessel." Then there are certain other provisions in the clause which I do not think I need read. Apart, however, from the Harter Act, the plaintiffs say, firstly, that there is a short answer to this clause—namely, that it applies only to a package, and here there was no package. The goods are expressly stated to be unboxed, and the case was argued before me by both parties, who doubtless want a decision on what are known to be the actual facts, on the footing that the cars were put on board without any covering, or, to state it in another way, just as they came from the works. I confess I do not see how I can hold that there is any package to which the clause can refer. "Package" must indicate something packed. It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not, in my opinion, possibly apply to a shipment in bulk. If the shipowners desire that it should refer to any individual piece of cargo, it would not be difficult to use appropriate words, as, for instance, "package or unit," to use the language of The Hague Rules. The only case that I have been able to find that assists, though perhaps not much, is *Whaite* v. *Lancashire & Yorkshire Ry. Co.* (1) There the plaintiff put pictures into a wagon with sides but no top, and loaded it on a railway truck, and the Court held that the wagon was a parcel or package within the Carriers' Act, as the goods were packed in the wagon. It seems to me that the primary object of this clause is to protect a shipowner against receiving an article of considerable value so covered as to prevent him from seeing what it is, this being at least one of the objects of the Carriers' Act, and in *Whaite's* case (1) Bramwell B. stressed that though the railway company could see that there were pictures in the wagon, they could not see their exact character, as this was concealed by the plaintiff's mode of packing. While I hope I am not giving an unduly narrow construction to the clause, I do not feel that I can hold that a motor-car put on a ship without a box, crate or any form of covering is a package, without doing violence to the English language.

This disposes of the second question, but I think I ought

(1) L. R. 9 Ex. 67.

to express an opinion on the point as to whether the clause is in conflict with the Harter Act. Here, again, while there is no express decision, there is valuable assistance to be obtained from the judgment of Horridge J. in *Anthony Hordern & Sons, Ld.* v. *Commonwealth & Dominion Line, Ld.* (1), in which he refers to a decision of Bailhache J. in *Tuck* v. *America-Levant Line.* (2) Both Horridge J. and Bailhache J. followed the opinion of the Supreme Court of the United States of America in *Calderon* v. *Atlas Steamship Co.* (3), and held that the clause did not conflict with the Act. The reason, as I understand it, is this: the Act does not prevent the parties agreeing the value of the goods shipped, and if the shipowner accepts liability up to the agreed value, he is not limiting his liability. It is clear here that it was open to the shippers to declare their goods at a value higher than 250 dollars, in which case they would have had to pay a higher freight. It is not as if the shipowner would accept goods only on the terms that he was not to be liable beyond 250 dollars. In any case I am content to follow the opinion of Horridge J. in the case to which I have referred, and hold that the Harter Act does not invalidate the clause; but as I have held that in the particular circumstances of this shipment the clause has no application, the answer to the second question is also in the negative. The plaintiffs must have the costs of this argument.

Solicitors for plaintiffs: *Ince, Roscoe, Wilson & Glover.*

Solicitors for defendants: *Lightbounds, Jones & Co.*

(1) [1917] 2 K. B. 420, 425.
(2) (1914) Unreported.
(3) (1897) 170 U. S. 272.

A. W. G.

BARNES (INSPECTOR OF TAXES) *v.* HELY HUTCHINSON.

1937
Oct. 15, 18.

Revenue—Income tax—Preference shares in company out of United Kingdom owning shares in companies in United Kingdom—Dividends paid in part out of profits already taxed in United Kingdom—Double taxation—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.*

The respondent was the beneficial owner of preference shares in a company registered in Calcutta carrying a fixed cumulative dividend at the rate of 8 per cent. per annum. The Calcutta company was the beneficial owner of ordinary shares in two British companies whose profits were assessed to United Kingdom income tax, the tax being deducted by the companies from the dividends on their ordinary shares. It was agreed that 44·12 per cent. of the dividend paid by the Calcutta company on their preference shares was paid out of the dividends received from the British companies which had already suffered taxation. The preference share dividend was paid to the respondent in full, without deduction for tax, and was paid direct, without the intervention of any paying agent:—

Held, confirming the finding of the Income Tax Commissioners, that the principle against double taxation applied and that the agreed proportion of the preference share dividend paid out of profits which had already suffered United Kingdom income tax could not again be subjected to the same tax.

The decision in *Gilbertson* v. *Fergusson* (1881) 7 Q. B. D. 562 discussed and followed.

CASE stated by the Commissioners for the General Purposes of the Income Tax for the City of London, pursuant to the provisions of s. 149 of the Income Tax Act, 1918.

At a meeting of the Commissioners John Walter Hely Hutchinson (hereinafter called "the respondent"), appealed against an assessment to income tax made upon him under the rules applicable to Case V. of Sch. D of the Income Tax Act, 1918, for the year ended April 5, 1933, in the sum of 6045*l*.

The respondent is the beneficial owner of 525 preference shares of Rs.1000 each in George Henderson & Co., Ld. (hereinafter called "the company"), which is a company registered in Calcutta. The said preference shares are entitled to a fixed cumulative dividend at the rate of 8 per cent. per annum. In addition to its preference capital the company has also issued ordinary share capital. The company is the beneficial owner of a large number of ordinary shares in two companies registered in England, namely, the Barnagore Jute Factory Co., Ld., and the Hunwal Tea Co., Ld. (hereinafter called "the British companies"). The whole of the profits of the British companies are assessed to United Kingdom income tax.

During the year ended April 5, 1931, the company received dividends upon its ordinary shares in the British companies amounting in Indian money to Rs.1,15,143. These dividends were paid out of profits of the British companies which had borne United Kingdom income tax, and such tax was deducted by the British companies from the dividends in question.

These dividends were applied by the company, together with other income which had not borne United Kingdom income tax, for the purpose of paying a dividend of 8 per cent. upon the preference shares of the company. It was agreed at the hearing that 44·12 per cent. of the said preference dividend was paid by the company out of the said taxed dividend received from the British companies. The said dividend upon the preference shares of the company was paid in full without any deduction for income tax on June 22, 1931, and the respondent received as and for the dividend due to him the sum of Rs.42,000. The said dividend was paid by the company by means of dividend warrants sent direct to the shareholders, without the intervention of any paying agents. Included in the assessment now under appeal is the full amount of the dividend so received by the respondent.

It was contended on behalf of the respondent that such part of the said dividend as was paid out of profits and gains which had already borne United Kingdom income tax (namely, 44·12 per cent.) could not again be subjected to the same tax, and that the assessment should be reduced accordingly.

It was contended on behalf of the appellant that the respondent was properly assessed under r. 1 of Case V. on the full amount of the preference dividend received by him from the company; that the assessment did not involve "double "taxation" in that the respondent and the company were respectively chargeable as separate entities in respect of separate sources of income; that the relief in *Gilbertson* v. *Fergusson* (1) was given on equitable grounds and that such grounds did not exist in the present case, where the income assessed was in respect of a fixed preference, as contrasted with an ordinary, dividend; that there was no reason in law or in equity why a preference shareholder in a foreign company should not suffer taxation on the full amount of the preference dividend he received, since a preference shareholder in an English company would suffer taxation by deduction at the source; and that the present case was distinguishable from *Gilbertson* v. *Fergusson* (1) by reason of the fact that in *Gilbertson* v. *Fergusson* (1) the company paying the dividends was the same as the company whose English profits had already been taxed, whereas in the present case there was the interposition of the Indian company, having no direct trading connection with this country, whose profits had not been directly assessed to United Kingdom income tax.

The Commissioners held that they were bound by the decision in *Gilbertson* v. *Fergusson* (1), and that the appeal of the taxpayer must be allowed as regards such part of the dividend in question as was paid out of profits and gains which had already borne United Kingdom income tax.

The Crown appealed.

Sir Donald Somervell A.-G. and *Reginald Hills* for appellant. *Gilbertson* v. *Fergusson* (1) does not apply. It dealt with an ordinary, not a preference shareholder. There may be some equity in an ordinary shareholder saying that, if this allowance is not made, he is subject to double taxation; but that does not apply to a preference shareholder, who is in no case entitled to more than his fixed rate of interest less income tax. Further, it may be doubted whether *Gilbertson* v. *Fergusson* (1) would be decided in the same way nowadays.

Broadly speaking, what a shareholder in an English company receives is not the gross amount of the dividend declared, but a sum of money and immunity from income tax in respect of that particular item of income.

(1) 7 Q. B. D. 562.

The rule that taxing statutes are to be so construed, if possible, as to avoid double taxation is merely a rule of construction. There is nothing in the Act to say that a person may not be taxed twice. "Double taxation" at any rate means that the same person is taxed twice in respect of the same amount. The respondent has not been taxed twice. In *Gilbertson* v. *Fergusson* (1) the bank was taxed in two different capacities, but here the English companies were taxed on their incomes, not the respondent.

The second point is that the respondent cannot be better off merely because he holds shares in a foreign company. If he had been an English shareholder he would not have got 8*l.* for each 100*l.* share, but only 8*l.* less tax at the standard rate. It makes no difference that the foreign company pays the dividend in full and that the tax is paid under an assessment instead of by deduction.

Thirdly, if the respondent is right, in the case of every share in a foreign company which the shareholder gets without deduction of tax, one would be entitled to go to the Inland Revenue authorities with the accounts of that company and say: "I have had a dividend of 5*l.* gross, but I have been "paid out of a pool of profits of which (say) 20 per cent. has "been subject to British income tax, so you must only tax me "on a proportion of 5*l.*" The result would be chaos.

Fourthly, if the respondent's contention is right, the assessment in respect of each share should have been not 8*l.* but about 5*l.*, and that assessment under the Act is conclusive for purposes of surtax. It would be odd if he should be entitled to pay not only no income tax but no surtax. He would only have to bring in 5*l.*

In *Gilbertson* v. *Fergusson* (1) the Crown does not seem to have argued that the foreign shareholders were not entitled to escape income tax because the company earned part of its dividend in England and received it subject to deduction of British income tax. It was conceded that it would be inequitable to tax on the whole amount and that in making an allowance in respect of the dividends a reduction should be made in respect of the proportion which had already borne tax. But in that case a single entity was assessed in a double capacity. It was an exceptional case and one to be treated on its own facts.

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(1) 7 Q. B. D. 562.

Roland Burrows K.C. and *Terence Donovan* for the respondent. The question in *Gilbertson* v. *Fergusson* (1), was not whether the same person was taxed twice but whether tax was being claimed twice out of the same fund. It was a decision of general application. The Court of Appeal in 1881 was well aware of the distinction between a company and its members, and in *Gilbertson* v. *Fergusson* (1) it came to the conclusion that where a foreign company carrying on business, and also deriving an income subject to deduction of British income tax, declared a dividend, the true figure at which an English shareholder in the foreign company should declare his dividend was the amount of the dividend less the proportion on which tax had already been borne.

If this point was not argued by the Crown in *Gilbertson* v. *Fergusson* (1), the inference is that the Crown then regarded it as incontestable. *Inland Revenue Commissioners* v. *Roberts* (2) is again a long way from taxation of the same person. It was a question of taxation out of the same fund.

[LAWRENCE J. It fell on the same person, as a partner up to September, 1919, and as a shareholder thereafter.]

There is no distinction between a preference and an ordinary shareholder for this purpose. Every shareholder, whatever denomination of shares he holds, is equally a member of the company. The nature of a share was discussed by Farwell J. in *Borland's Trustee* v. *Steel Bros. & Co., Ld.* (3)

Reginald Hills in reply.

LAWRENCE J. In spite of the able arguments which have been addressed to me on behalf of the Crown, I think that on the authorities as they stand the decision of the Commissioners was right. The respondent is a preference shareholder in an Indian company and that Indian company is the shareholder in

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(1) 7 Q. B. D. 562.

(2) (1925) 9 Tax Cas. 603.

(3) [1901] 1 Ch. 279, 286.

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two English companies. The profits of those English companies have suffered taxation. The question which I have to decide is whether the respondent can get the benefit of a proportion of the tax which has been paid by those English companies.

The dividends which the Indian company receives from the two English companies form 44·12 per cent. of the total profits of the Indian company, and the respondent contends, and the Commissioners have held, that he is to be treated as having borne 44·12 per cent. of the tax upon the dividends which he actually receives from the Indian company. That view has been adopted by the Commissioners, basing themselves upon the authority of the case of *Gilbertson* v. *Fergusson* (1), which was decided in 1881. That was the case of the Imperial Ottoman Bank, which had an English agency in London which conducted a banking business in London and made profits in England. It was held that the English committee which acted as paying agent to English shareholders in the Imperial Ottoman Bank was entitled to the benefit of the tax paid upon the English profits in the proportion that those profits bore to the total profits of the Imperial Ottoman Bank. The Commissioners have held that that case is applicable to the present case. The contention for the English agency, the Imperial Ottoman Bank, was that as the profits of the English agency were sufficient to pay the dividends payable in England, those dividends ought to be paid without any further tax being paid upon them; but the Court held that that was not so, but that those dividends were bound to suffer taxation in the proportion which the English profits bore to the total profits of the Imperial Ottoman Bank.

The Attorney-General and Mr. Hills have contended that *Gilbertson* v. *Fergusson* (1) is at any rate not decisive of the present case, and really throws no light upon it, in the first place because the point actually decided as to the proportion was conceded by the Crown; secondly, that in that case they were dealing with ordinary shareholders, who suffer the taxation, as the Attorney-General and Mr. Hills contended,

(1) 7 Q. B. D. 562.

directly and alone as opposed to a preference shareholder, whose preference dividend, if it is paid to him in full, suffers no part of the taxation; and, thirdly, because the judgments in that case, in dealing with the question of double taxation, say that the principle against double taxation applies where it is the same person who suffers the tax, and that there it was the Ottoman Bank which suffered the tax and which was assessed, whereas here it is not the respondent who suffered the tax but the English companies. Lastly, it is contended for the Crown that in any event in this case the connection between the respondent and the company who has paid the tax is too remote, and that whereas in the case of English companies the tax is assessed upon the company, in the case of the Imperial Ottoman Bank, referred to in *Gilbertson* v. *Fergusson* (1), it was assessed upon the agency, and in the present case it is assessed, there being no agency, upon the particular shareholder—namely, the respondent.

Reliance was placed, on behalf of the respondent, not only upon the case of *Gilbertson* v. *Fergusson* (1), but upon the principle which has been enunciated in the House of Lords in *Neumann* v. *Inland Revenue Commissioners* (2), by which decision it was held that where the profits of a company have suffered income tax, those profits should not suffer further income tax in the hands of the company's shareholders. The Crown contend that that principle is applicable only to English companies, by reason of the provisions of the Income Tax Acts which deal with English companies, and that no such principle applies to foreign companies.

In my opinion *Gilbertson* v. *Fergusson* (1) shows that a similar principle is applicable to foreign companies and that, notwithstanding the fact that the tax upon dividends from foreign companies depends upon Case V. and upon Miscellaneous Rule 1, the principle against double taxation applies in the case of foreign companies, so as to exempt shareholders in foreign companies from suffering double taxation. I can see no reason for distinguishing between

(1) 7 Q. B. D. 562.

(2) [1934] A. C. 215.

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a foreign company which pays its dividends through a paying agent and one which pays them direct to the shareholders; nor can I see any difference between a preference shareholder and an ordinary shareholder. The ordinary shareholder may be said, in one sense, to suffer the tax more directly than the preference shareholder, but the preference shareholder feels the burden of the tax as well, and the principle which underlies *Neumann's* case (1)—a principle which appears to me to have been the governing principle for the decision in *Gilbertson* v. *Fergusson* (2)—shows that it is not necessary that the individual shareholder should actually bear the whole burden of the tax; it is sufficient if the profits out of which the dividends are paid have suffered tax. That is the principle of *Neumann's* case. (1) In this present case the profits of the Indian company, George Henderson & Co., Ld., in so far as they consist of the profits of the two English companies, have suffered English income tax just as the profits of the Imperial Ottoman Bank English agency had suffered English income tax, and, therefore, in the proportion that the said profits bear to the total profits of George Henderson & Co., Ld., I am of opinion that the individual shareholder, the respondent, in George Henderson & Co., Ld., is entitled to relief from taxation upon his dividends.

For these reasons I am of opinion that the decision of the Commissioners was right, and the appeal will be dismissed with costs.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Sanderson, Lee & Co.*

(1) [1934] A. C. 215.

(2) 7 Q. B. D. 562.

A. W. G.

COLLINS (INSPECTOR OF TAXES) *v.* JOSEPH ADAMSON & COMPANY.

1937
Oct. 19, 20.

JOSEPH ADAMSON & COMPANY *v.* COLLINS.

Revenue—Income Tax—Association of boilermakers for maintaining prices—Pooling system—Purchase by Association of undertaking of company intending to sell to a non-member—Contribution towards acquisition of control of competing non-member company—Member's share of expenditure by Association—Whether deductible from member's trading profits as revenue expenditure—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Case I, Schedule D.*

The taxpayer was a member of an Association of boilermakers having for its object the maintenance of prices by means of a pooling system. The Association, in order to secure the success of its object, purchased the undertaking of a company which was a member of the Association in order to close it down and prevent its being acquired by persons outside the Association. It also made a grant to one of its members to enable that member to acquire a controlling interest in an outside competing business and bring its operations within the rules of the Association. The taxpayer sought to deduct from his trading profits for the purpose of income tax assessment his share of the Association's expenses in each instance:—

Held, that in each instance the payment made by the Association had created for the members of the Association advantages of an enduring nature properly to be treated as capital, and in neither case was the deduction which was claimed allowable.

CASE stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts, held on January 13, 1937, Joseph Adamson & Co. (hereinafter called "the firm") appealed against an additional assessment to income tax for the year ended April 5, 1936, in the sum of 53*l.* made upon it under the provisions of Case I, Sch. D, of the Income Tax Acts.

The firm carries on the business of boilermakers and is a member of the Association of Shell Boiler Makers (hereinafter referred to as "the Association"). The Association was founded in 1913 as the Boiler Manufacturers' Association. It was reconstructed in 1933 under its present name in order to include as many types of boilers and boilermakers as possible. The Association is comprised of some sixteen members, who are the principal makers in the British Isles of Lancashire, Cornish and Economic boilers. The object of the Association is to maintain prices by means of a pooling scheme. A deposit of 500*l.* is required from each member. The members sell boilers manufactured by them at prices which are fixed by the Association. In the case of every boiler sold the members pay to the Association a predetermined sum. After placing to a general fund the amount required to pay the expenses of the Association, the balance is appropriated as follows: 25 per cent. is divided quarterly between all members equally with a limit of 500*l.* per member per annum, 50 per cent. is divided between all members in proportion to their respective quotas, 25 per cent. is placed to a reserve fund, to be the property (on a quota basis) of the members of the Association, and to be used for such purposes (including further distribution, purchase of businesses or of secondhand boilers) as the Association by a 75 per cent. majority decide. In the firm's accounts all payments made to the Association are debited and all sums received from the Association are credited. The sum of 53*l.*, forming the subject of the said additional assessment under appeal, was disallowed as a deduction in computing the firm's profits for the purposes of income tax under the provisions of Case I, Sch. D, of the Income Tax Acts.

The said sum of 53*l.* was composed of two items of 21*l.* and 32*l.* paid by the firm to the Association. The sum of 21*l.* represented the firm's share of an expenditure of 1811*l.*, part of an expenditure of 7061*l.*, made by the Association in respect of Hewitt and Kellett, Ld. The sum of 32*l.* represented the firm's share of a payment of 2750*l.*, part of a grant of 5500*l.*, made by the Association to John Thompson (Wolverhampton), Ld. The sums of 1811*l.* and 2750*l.* above referred to are the parts of the said sums of 7061*l.* and 5500*l.* respectively charged by the Association in its Income and Expenditure Account for the year ending June 30, 1934.

The facts relating to the said expenditure in respect of

Hewitt and Kellett, Ld., are as follows: Hewitt and Kellett, Ld., was a member of the Association. Owing to dissensions between its controlling shareholders it decided to sell its business, despite the fact that it was contrary to the Association's rules for a member to sell his business without the Association's consent. The Association became aware that the intending purchaser of the business was not a member of the Association and was hostile to it. It appeared that the proposed sale would wreck the Association. Accordingly, the Association negotiated with Hewitt and Kellett, Ld., and ascertained the price asked for the sale of the business. As a result Hewitt and Kellett, Ld., on February 28, 1934, agreed with the Association to sell to it the goodwill, trade-marks, patents, drawings and other books and papers, and to take immediate steps to close down the business. It was also agreed that John Hewitt, who owned the land on which the boiler works stood, should not, during a period of twenty years, use or allow to be used the land or buildings for the manufacture, sale or repair of boilers. The consideration for the said agreement was a payment of 3500*l.* to Hewitt and Kellett, Ld., and a payment of 3500*l.* to John Hewitt. The total sum expended, or to be expended, by the Association under this head, including legal costs, amounted to 7061*l.*, of which 1811*l.* was expended in the year in question. The said sum of 21*l.* represents the firm's share of the said sum of 1811*l.*

The facts relating to the said grant of 5500*l.* to John Thompson (Wolverhampton), Ld., are as follows: Some time in 1933 the persons in charge of the affairs of the Association came to the conclusion that the success of the pooling scheme depended upon the admission, as a member, of Wilsons Boilermakers, Ld., Glasgow. This particular company, however, refused to join and as a result another Scottish Boilermaker Company also declined to become a member. To save the situation, John Thompson (Wolverhampton), Ld., a member of the Association, agreed to buy up, or get control of, Wilsons Boilermakers, Ld., provided the Association made a grant towards the cost. The Association agreed to grant 5500*l.* to John Thompson (Wolverhampton), Ld., and the latter purchased 80 per cent. of the shares in Wilsons Boilermakers, Ld. The dates of payment of the said grant were dependent on the Association's ability to pay. In the year material to this appeal the amount paid to John Thompson (Wolverhampton), Ld., was 2750*l.* The balance will be or has been paid since. The said sum of 32*l.* is the firm's share of the payment of 2750*l.*

Mr. Skinner, a chartered accountant, and secretary of the Association since its formation, gave evidence before us at the hearing, which we accepted, as follows: The Association from its inception in 1913 never ceased to function, but between February, 1931, and May, 1933, there was no pool. The Association under its present name came into existence on June 1, 1933, and was treated, for the purposes of taxation, as a successor to the Boiler Manufacturers' Association. The reserve fund of the Association could be used to purchase businesses or secondhand boilers. It could also be distributed to the members. The object of the said agreement dated February 28, 1934, was to terminate the business of Hewitt and Kellett, Ld., and eliminate competition from non-members. No goodwill, trade marks, patents, books or accounts of this business were ever in fact assigned or handed over. The drawings, relating to the manufacture of boilers, were not taken over by the Association but were destroyed at the works of Hewitt and Kellett, Ld., in the presence of a representative of the Association; the key plant was either scrapped or sold to members; none of it was in fact acquired by the Association. It would have injured the interests of the Association if the proposed sale had taken place. The business ceased, and anybody interested in it was precluded from carrying on the same business for ten years. The covenant contained in clauses 4 and 5 of the said agreement and the destruction of the drawings adequately provided for elimination of future competition.

With regard to the grant to John Thompson (Wolverhampton), Ld., Wilsons Boilermakers, Ld., had ceased to be a member of the Association in 1932. The Association could have remained in existence without the latter's membership, but no pool could be operated without it. The Association

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did not know what price was paid for the shares and did not acquire any of the shares.

It was contended on behalf of the firm that the said sums of 21*l.* and 32*l.* should be allowed as deductions in computing its profits for the purposes of income tax under the provisions of Case I., Sch. D.

It was contended on behalf of the Inspector of Taxes that the said sums of 21*l.* and 32*l.* represented capital expenditure and were not an allowable deduction in computing the firm's profits.

We, the Commissioners, gave our decision as follows: The payment of 7061*l.* by the Association in respect of Hewitt and Kellett, Ld., was made in order to close down that business and eliminate competition by non-members. In our opinion this expenditure did not bring into existence any asset. We hold that the firm's share of this expenditure, viz., 21*l.*, is allowable as a deduction in computing its profits for taxation purposes. The grant to John Thompson (Wolverhampton), Ld., was made in order to enable that company to acquire control of the business carried on by Wilsons Boilermakers, Ld., as a going concern, by the purchase of shares. On control being obtained trading operations were carried on subject to the rules of the Association. In our opinion the Association in making the grant acquired an asset. We hold that the sum of 32*l.*, viz., the firm's share, is an expenditure of capital and must be disallowed. We reduced the assessment to 32*l.*

Appeal and cross-appeal were brought by the Crown and Joseph Adamson & Co. respectively.

Sir Terence O'Connor S.-G. and *Reginald Hills* for the Crown. In the words of Lord Cave L.C. in *British Insulated & Helsby Cables, Ld.* v. *Atherton* (1), "where an expenditure is "made, not only once and for all, but with a view to bringing "into existence an asset or an advantage for the enduring "benefit of a trade," such an expenditure is properly attributable to capital and not to revenue. A negative advantage may be of a capital nature equally with a positive advantage. If the Association acquired a capital asset it is quite immaterial

(1) [1926] A. C. 205, 213.

to the Crown's argument what they did with it afterwards. It is the acquisition of the thing which gives it a capital distinction, whether the advantage be positive or negative. In fact, Adamson & Co. have gained a very definite advantage from these payments. The elimination of competition meant the making of increased profits, divisible among the members of the Association, including Adamson & Co. Furthermore, the pool, which was deemed to be necessary for the security of the boilermaking business, was prevented from breaking down and in its breakdown dissolving the 500*l.* which was Adamson & Co.'s share in the Association. Therefore, even if it be the test, which is not admitted, that it must be possible to point to an asset of advantage, that test is fully satisfied. It may be that you cannot weigh up the advantage in £ *s. d.*, but it cannot be doubted that Adamson & Co. have acquired a definite advantage.

Cyril King K.C. and *J. L. Addleshaw* for Joseph Adamson & Co. There is not in this case that "enduring benefit" to which Lord Cave L.C. referred in *British Insulated & Helsby Cables, Ld.* v. *Atherton.* (1) All that accrued to the Association under the contract for the purchase of Hewitt and Kellett, Ld., was an intangible, impalpable thing. You cannot put your finger on it and identify it, and say "here is an asset." It is quite impossible to identify the result of the expenditure. No doubt it was thought that an advantage would result from the expenditure, but for all one can tell no advantage was gained. It is entirely unknown, and on the facts as they are known it is impossible to say that anything in the nature of a fixed enduring benefit has resulted. As to the transaction in regard to Wilsons Boilermakers, Ld., neither the Association nor Adamson & Co. have acquired any asset which can be identified. Neither has acquired any shares in Wilsons Boilermakers, Ld., and neither knows what price was paid for them. The judgments in *Mitchell* v. *B. W. Noble, Ld.* (2) support the view that expenditure made to gain a trading advantage by getting rid of a nuisance—in the present case competition—is not capital expenditure.

(1) [1926] A. C. 205.

(2) [1927] 1 K. B. 719; 11 Tax Cas. 372.

LAWRENCE J. In these two cases the question which arises is whether payments which have been made by Messrs. Joseph Adamson & Co. to the Association of Shell Boiler Makers, of which they were members, were payments which are properly attributable to capital, or which can properly be charged against revenue.

There are two payments in question, one a sum of 21*l.* which Adamson & Co. paid to the Association in connection with the agreement which the Association entered into, through its trustee, with Hewitt and Kellett, Ld., and the other a sum of 32*l.* which Adamson & Co. paid to the Association as part of the grant of 5500*l.* to John Thompson (Wolverhampton), Ld., in consideration of John Thompson (Wolverhampton), Ld., acquiring 80 per cent. of the shares of Wilsons Boilermakers, Ld. The Commissioners have decided that in the case of Hewitt and Kellett the payment made by Adamsons was a revenue payment, because Adamsons did not thereby bring into existence any asset; but in the case of the 32*l.* they have held that the Association, in making the grant, did acquire an asset and that therefore the 32*l.* was an expenditure of capital and must be disallowed.

It was agreed before me that no distinction ought to be drawn between Adamson & Co. and the Association, and it has been admitted, as I understand it, before the Commissioners and before me, that both of these sums, the 21*l.* and the 32*l.*, were sums which were laid out exclusively for the purposes of Adamsons' trade.

The Association was an Association for the purposes of keeping up prices, and under its rules a pool of profits was established in which the members of the Association were to share. Hewitt and Kellett, Ld., had been members of this Association, but they proposed to cease to be members, and to sell their business to another firm or company who did not intend to be members of the Association. In those circumstances the Association thought it desirable to acquire the business of Hewitt and Kellett, Ld., and they did acquire the business, through their nominee, by the agreement of February 28, 1934, which is scheduled to the Case, under which Hewitt and Kellett, Ld., sold to the nominee the goodwill of Hewitt and Kellett, Ld., and all trade marks, patents, drawings, name, and other books and papers. Hewitt and Kellett, Ld., and their shareholders covenanted with the nominee that they would close down the business and would wind up the Company, and that the machinery should be scrapped, with the exception of portions which might be purchased by members of the Association. Mr. John Hewitt, who was the owner of the land on which the business of Hewitt and Kellett, Ld., had been carried on, was to covenant not to use that land for the business of a boilermaker for twenty years. In consideration of the sale of the assets, and of Mr. John Hewitt's covenant, the Association agreed to pay a sum of 3500*l.* for the assets and 3500*l.* for the covenant by John Hewitt; 1811*l.* was the expenditure in the year which is under consideration in this case, and 21*l.* is the proportion of Messrs. Adamson.

Attention was drawn in argument to the fact that this consideration was stated to be for the assets set out in cl. 1 of the agreement, which do not include the machinery, and the other 3500*l.* was the consideration for a covenant of Mr. John Hewitt, and there was no consideration attributed specifically in the agreement to destroying the machinery.

This agreement was carried out, and the machinery was destroyed by Hewitt and Kellett, Ld., in the presence of a representative of the Association. It is found by the Commissioners that "no goodwill, trade marks, patents, "books or accounts of this business were ever in fact assigned "or handed over"; the drawings were destroyed and the plant was scrapped or sold to members. Those are the facts in the Hewitt and Kellett case.

In the John Thompson (Wolverhampton) case the Association considered that it was essential to the Association to get a company called Wilsons Boilermakers, Ld., Glasgow, into the Association. They agreed with John Thompson (Wolverhampton), Ld., who were members of the Association, that the Association would grant to John Thompson (Wolverhampton), Ld., a sum of 5500*l.* towards the cost of John Thompson acquiring 80 per cent. of the shares of Wilsons Boilermakers, Ld. John Thompson (Wolverhampton), Ld., accordingly acquired those shares, and the 32*l.* which has been paid by Adamsons is their share of the 5500*l.* for the year in question.

In these circumstances Adamsons contend, through Mr. Cyril King, that neither of these payments was of a capital nature ; that they are both truly revenue payments and ought to be charged against the profits of the year ; that they produced no asset to Adamsons or to the Association ; that any advantage which they may be thought to have produced was of such a problematical, impalpable, intangible character that it cannot be regarded as being of a capital nature. The Solicitor-General, on the other hand, contended that the payments were made for the purpose of acquiring capital assets or enduring advantages of a capital nature and that, on the authorities, they were properly attributable to capital and not to revenue.

The cases to which my attention was drawn were, in the first place, *British Insulated & Helsby Cables, Ld.* v. *Atherton* (1), and particularly to the much-commented-upon dictum of Lord Cave L.C., where he said : "But when an "expenditure is made, not only once and for all, but with a "view to bringing into existence an asset or an advantage for "the enduring benefit of a trade, I think that there is very "good reason (in the absence of special circumstances leading "to an opposite conclusion) for treating such an expenditure "as properly attributable not to revenue but to capital." In that case the House of Lords was dealing with a fund which had been created by the respondent company as a nucleus of a pension fund for its employees. The money had been handed over to trustees for the employees of the respondent company, and it had been contended on behalf of the respondent company that the payment of that money to trustees created in the hands of the respondent company no asset at all, and that therefore it could be charged to revenue ;

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(1) [1926] A. C. 205, 213.

but the House of Lords came to the conclusion, on the principle stated by Lord Cave, that the company had by this payment of money created for itself an enduring benefit or advantage which was of a capital nature.

The next case that was referred to was the case of *Mallett* v. *The Staveley Coal & Iron Co., Ld.* (1) That was a case where a payment had been made by a coal-mining company to alter the terms of one lease of coal measures, and also to get rid altogether of another lease of coal measures, which the company considered were onerous leases. It was held that the payment for the surrender and alteration of these leases was an expenditure of capital and not chargeable against profits. The fact that the company was there dealing with what were undoubtedly its capital assets was relied upon by Mr. King as a material distinction from the present case. On the other hand, the Solicitor-General relied upon the passage in the judgment of Rowlatt J., where he said this: "The company have got nothing, says Mr. Latter, for this "expenditure. Perhaps that may be so, but they have got "this: that they have got a field of minerals which has the "advantage of being no longer encumbered with an undesirable "part. It seems to me that the whole transaction on the "clearest possible principles is a capital transaction." Adopting that reasoning, the Solicitor-General contends that, just as that coal company had paid that sum of money for the purpose of getting rid of an undesirable lease, so the money was here paid for the purpose of getting rid of an undesirable competitor, and for the purpose of getting rid of the assets of this other company, which were being used in competition with the members of the Association.

In *Glenboig Union Fireclay Co., Ld.* v. *Inland Revenue Commissioners* (2), it was held that a sum of money which was received by a fireclay company from a railway company for agreeing to refrain from working the fireclay was a capital receipt. That case, again, was open to the observation of Mr. King that it was dealing with what were undoubtedly the capital assets of the Glenboig Fireclay Company, and was

(1) [1928] 2 K. B. 405, 410.

(2) 1922 S. C. (H. L.) 112; 12 Tax Cas. 427.

a case in which the Glenboig Fireclay Company was the recipient of the money.

The next case was the *Anglo-Persian Oil Co., Ld.* v. *Dale* (1), where 300,000*l.* had been paid by the Anglo-Persian Oil Company to its commission agents in the East to cancel their contract. That sum was held to be a proper revenue debit for the Anglo-Persian Oil Company, on the ground, in my opinion, that it was a lump sum to get rid of onerous revenue payments to the agents in the future. That, in my opinion, appears from the passages in the judgment of Rowlatt J.

In *Van den Berghs, Ld.* v. *Clark* (2) a payment of 450,000*l.* was made by one of the companies concerned (the Dutch company) to the English company for the surrender of the rights of the English company under an agreement, whereby the whole of the English company's business was so closely woven into the business of the Dutch company that the view was taken that this 450,000*l.* ought to be treated as capital.

Mr. King relied, so far as authority was concerned, upon *Mitchell* v. *B. W. Noble, Ld.* (3) That was the case of a payment of 19,200*l.* being made to a director to get rid of his services, as he was thought to be undesirable. It was held that that was a proper charge against revenue. Mr. King argued that that case has a bearing upon the present case, because, just as there the director was got rid of once and for all, so here Hewitt and Kellett, Ld., were got rid of once and for all, and the advantage of getting rid of the director in that case might be said to be as enduring as the getting rid of a competitor in the present case. But, in my opinion, the ratio decidendi which was adopted in that case was that the difficulty which had arisen with this director was the sort of difficulty which may be expected to arise in the ordinary course of a company's business, and therefore is an ordinary incident of the company's business, and may properly be charged against the profits of the year. That view appears to me to be shown by the judgment of Rowlatt J., and also by the judgment of Sargant L.J. (4)

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(1) [1932] 1 K. B. 124.

(2) [1935] A. C. 431.

(3) [1927] 1 K. B. 719; 11 Tax Cas. 372, 415, 422.

(4) [1927] 1 K. B. 738.

The Solicitor-General referred also to the case of *Southwell* v. *Savill Brothers, Ld.* (1) It was there held that money spent by a brewery company in unsuccessfully attempting to get more brewery licences was equally a capital charge as in cases where the money was spent in successfully getting brewery licences. It was argued for the Crown that that shows that it is not necessary, in order that the expenditure should be of a capital nature, that there should be any tangible asset created by the expenditure. If the money is spent for the purposes of the trade, and the expenditure would, if successful, produce either a capital asset or an asset of an enduring nature, or an advantage of an enduring nature, which is of a capital nature, it is equally a capital payment if the expenditure is unsuccessful.

From that case I think it may be deduced that you cannot test the question whether the payment is properly a capital or a revenue payment by seeing whether it can be shown to be productive. Nor do I think that the argument of Mr. King, that what was produced by the expenditure in the present cases was impalpable or intangible or incalculable, is a sound argument for holding that it must be treated as of a revenue nature. In fact, in both the present cases the payments which were made had as a result the removal or the prevention of a trade competitor, who would not have been subject to the rules of the Association. In my opinion, these payments created for the members of that Association advantages of an enduring nature, and, I think, of such an enduring nature as properly to be treated as capital, and not to be treated as revenue. It appears to me that the present case is really a stronger case than *British Insulated & Helsby Cables, Ld.* v. *Atherton* (2), because in the present case there was this company, Hewitt and Kellett, Ld., which, by reason of this payment, ceased to exist, and the land on which its business had been carried on was sterilized for the purpose of boiler-making for the period of twenty years; all its assets were disposed of; and it does not appear to me to make any difference whether they were acquired by the members of the

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(1) [1901] 2 K. B. 349.

(2) [1926] A. C. 205.

Association for the purpose of exploitation in the business of boilermaking, or for the purpose of being scrapped. They were equally acquired by the members of the Association, and such acquisition appears to me to be clearly a capital acquisition. The fact that the value of that acquisition is doubtful is, of course, applicable to almost every trade acquisition, and was equally applicable to the value of the fund created in *Atherton's* case (1); but in both cases the trader had himself put a value upon the advantage which he was acquiring. In *Atherton's* case (1) the sum transferred to this pension fund was the sum which the directors of the company thought it wise to set aside; and here the sum paid by the Association was the sum which they thought it was worth while to pay to remove from the arena a possible competitor, who was supposed to be going to purchase the business of Hewitt and Kellett, Ld.

In the case of John Thompson (Wolverhampton), Ld., the result to the Association and its members of the grant of 5500*l.* was that Wilsons Boilermakers, Glasgow, were brought into the combine and their profits became subject to the pool, which was necessary in the opinion of the Association to keep the scheme going. In that case, too, I think that the payment was of a capital nature, because it created what I think may properly be called an asset, or at least an advantage of an enduring nature.

For these reasons, with the greatest possible respect to the Commissioners, I am unable to agree with their conclusion on the first case, and I accordingly allow the appeal in the case of Hewitt and Kellett, Ld., and dismiss the appeal in the case of John Thompson (Wolverhampton), Ld., with costs.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for Adamson & Co.: *Gregory, Rowcliffe & Co.*

(1) [1926] A. C. 205.

A. W. G.

1937
Nov. 23.

MERCANTILE UNION GUARANTEE CORPORATION, LIMITED *v.* WHEATLEY.

Contract—Hire-purchase Agreement—Title of Owners—Default by Hirer—Implied condition as to Title—Material date.

Under a hire-purchase agreement dated February 7, 1936, the plaintiffs agreed to let a motor-lorry to the defendant on usual hire-purchase terms. The lorry was bought and paid for by the plaintiffs on February 11, 1936, and was delivered to the defendant on March 8. On September 16, 1936, the plaintiffs re-took possession of the lorry, the defendant having got into arrears with his instalments, and sued the defendant for the balance of depreciation money and instalments due. The defendant sought to repudiate the contract on the ground that the plaintiffs had broken the condition, express or implied, that they were the owners of the lorry, and had a good title to sell or hire it, at the date of the signing of the agreement:—

Held, that the material date at which the implied condition as to title arose was not the date of the signing of the agreement but the date of the delivery of the lorry to the would-be hire-purchaser, and that by the material date the plaintiffs were the owners of the lorry.

Karflex, Ld. v. *Poole* [1933] 2 K. B. 251 explained and (on the facts) distinguished.

ACTION on an agreement of hire-purchase.

The plaintiffs, the Mercantile Union Guarantee Corporation, Ld., claimed from the defendant, Thomas George Wheatley, 177*l.* 3*s.* 11*d.*, the balance of agreed depreciation money and arrears of instalments due under a hire-purchase agreement in respect of a 4/5 ton Commer lorry.

The defendant relied on *Karflex, Ld.* v. *Poole.* (1) He contended that it was an express or implied condition of the hire-purchase agreement that the plaintiffs were at the date of the agreement, and would continue at all material times to be, the owners of the vehicle and in a position to give a good title to the hire-purchaser, whereas in fact neither on November 16, 1935 (when an earlier agreement was signed), nor on February 7, 1936, the date of a substituted agreement, were the plaintiffs the owners of the lorry which they purported to let on hire. The defendant therefore repudiated liability for the claim, and, the plaintiffs having determined the hire-purchase agreement under the terms thereof, counterclaimed for the return of the sums already paid, amounting to 144*l.* 1s., or, alternatively, for the return of the lorry, or its value, and 40*l.* for loss of profits.

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(1) [1933] 2 K. B. 251.

The facts are set out in sufficient detail in the judgment, the case only being reported as explaining, and distinguishing, *Karflex, Ld.* v. *Poole.* (1)

Gordon Alchin for the plaintiffs.

W. Russell Lawrence for the defendant.

GODDARD J. When the facts are understood this is, I think, really quite a simple case. It is a claim under a hire-purchase agreement in respect of a motor-lorry, but when the facts are looked into it is really hire-purchase finance. There are certain elements of complication which generally arise in these cases, and this case is no exception because of the transactions of the motor dealer in the matter. It is abundantly clear that the defence, with all respect, has no merits whatever. The defendant has got exactly what he bargained for. But it is sought to bring the case within the decision of *Karflex, Ld.* v. *Poole* (1), in which, to my mind, the facts were wholly different.

The position is this. At the end of 1935 Mr. Wheatley, the defendant, entered into negotiations with Dunns Motors, Ld., of Taunton, for the purchase of a Commer lorry. Mr. Wheatley could not pay cash for it, and Dunns Motors, Ld., therefore, on the terms which are usual with nearly every motor dealer, had an arrangement with a hire-purchase finance company, and through them the defendant made proposals for the plaintiffs to finance the transaction. For some reason, which does not seem to matter very much, that transaction was never perfected. On November 16, 1935, a suggestion was made for a hire-purchase agreement in respect of a 4/5 ton Commer lorry, 1935 model, price 485*l.* The parties, with

(1) [1933] 2 K. B. 251.

somewhat unnecessary haste, then seem to have signed all the documents. Mr. Wheatley signed a proposal for hire, and he also signed, to some extent in blank, a hire-purchase agreement. He also signed a blank order form in which the amount was to be put in, and a car delivery receipt, in which it was stated that it was only signed by the hirer when delivery of the vehicle was taken. The reason why that transaction did not go through was, I think, because of the delay in getting the car from the manufacturers.

These transactions, I should perhaps say, are perfectly well understood now, because in the last ten or twelve years hire-purchase finance agreements of all kinds have been made. A man who wants a car negotiates with the dealer, the shopkeeper, who sells cars. The dealer wants the money, and the customer wants to pay by instalments. To enable that to be done the dealer approaches the hire-purchase finance corporation and they agree to buy the car from the dealer, or rather to pay him for the car the sum which, together with the deposit, the intending customer is willing to put up. Very often the deposit is nothing more than the allowance on a second-hand car. To the agreed price for the car something has to be added, then the instalments are arranged, and the customer enters into an agreement direct with the hire-purchase finance corporation. They are the buyers of the car from the dealer.

In the present case, the first transaction not having gone through, and the documents not having been completed, Dunns Motors, Ld., on February 1, 1936, wrote to Mr. Wheatley: "We have just heard from the works that your chassis is "ready for collection, and we shall be glad if you will kindly "let us know where you wish to have same delivered, so that "the body may be made and fitted, or would you care to "collect it from the works yourself and take it to the body "builders ?" What that means is that the transaction contemplated was for the purchase of a Luton van, whatever that may be. That is the vehicle described on this November proposal. Mr. Wheatley, either because he thought he would get delivery more quickly, or for some other reason which does not matter, decided to have what is called a platform body. Dunns Motors, Ld., were perfectly willing that that should be arranged. It is clear from the correspondence that, instead of buying a complete car from the makers, they were going to get a chassis and have a body fitted to it, and that Dunns Motors, Ld., were going to pay for that to be done.

It was arranged between Dunns Motors, Ld., and Mr. Wheatley that the latter should collect the chassis from the makers, and he did so; but that did not alter the position in any shape or form. Of course, the plaintiffs had been approached for the money, and on February 10, 1936, there is this letter from them: "Dear Mr. Langdon, Following my "telephone conversation with you to-day, I enclose herewith "cheque value 285*l.* in favour of Dunns Motors, Ld., in settlement of the above transaction." Then the figures are set out. "So that you may have a record of the actual figures, "this cheque is made up as follows: Revised cost of vehicle, "445*l.*, less initial deposit, 110*l.*, 335*l.*; less 50*l.* held by our "company; total 285*l.*" They were not going to pay the full price to Dunns Motors until a certain number of the instalments had been paid. The letter goes on: "This 50*l.* "to be repaid to Dunns Motors as to 25*l.* after 12 rentals "have been satisfactorily paid, and the remaining 25*l.* after "18 rentals have been satisfactorily met. In view of the "alteration of the figures, don't you think it would be better "to have a fresh set of documents completed, and I am "sending you herewith the original set. You will note that "I have typed in the addition clause 12 *a*, giving us a lien "on the body, which I understand from you the hirer is "fitting himself, and would ask you to see that this clause is "duly initialled by Mr. Wheatley." Therefore the head office sent to the office which was dealing with this particular transaction the original documents which had been prepared in November, which were, as I say, not for a 1936 Commer car at 445*l.* but for a 1935 Commer car at 485*l.* That letter was followed by the letter on February 13, 1936, from the Mercantile Union Guarantee Corporation, writing from their

Yeovil office to their Cheltenham office: "I duly visited "Dunns Motors, Ld., and tendered cheque in settlement. "I have in my possession a complete new set of documents, "together with their invoice." That, I suppose, means the invoice by which Dunns Motors invoiced the car to the plaintiffs. Then the letter continued: "In my conversation "with you over the telephone I advised you that Messrs. "Dunns gave me to understand that in view of the delay "which had taken place in delivery the client had accepted "the chassis and was fitting his own body. Now I am informed "that this is not strictly correct. What has happened is as "follows: Dunns Motors, Ld., took delivery of the Commer "from works, and delivered the chassis direct to Mr. Wheatley "at Wembley. They—Dunns Motors, Ld.—have placed an "order with a body builder at Wembley to make and fit "a body to Wheatley's instructions, the account for which "will be forwarded direct to Dunns Motors, Ld., and they "will pay. It will therefore be seen that the whole transaction "is being carried through by them and not just the chassis "supplied, as I was previously informed. I trust I am correct "in not forwarding the agreement to Mr. Wheatley in connection "with the proposed insertion of clause 12 *a*. Dunns Motors, "Ld., did not take details of engine and chassis numbers "when the chassis was handed over, and this information was "requested in a letter sent to Mr. Wheatley yesterday. I will "retain the documents here till they are complete in this "respect."

That letter was written on February 13. On a date which I think must have been, according to this set of documents, earlier than February 13—it may have been late in January, or the early part of February—the hire-purchase agreement was filled in—that is to say, the proposal for the hire of this particular car chassis, the number of which was 76,109, the engine number of which was 15,023, and the 1936 price of which was 445*l.* Those particulars were also included in the hire-purchase agreement, and those were filled in some time before February 11. Perhaps I had better say, in case this matter goes farther, that the action has been tried before me without evidence on either side, except what is contained in the documents, and it is on that material—and it is quite enough—that I am deciding the case. On February 11 the cheque was actually paid over.

In those circumstances the only inference one can draw is that Dunns Motors, Ld., intended at that time to pass the property in the car to the Mercantile Union Guarantee Corporation, Ld. The plaintiffs could have refused if they had liked, and have said: "No, we are not going to have "anything to do with this, or part with our cheque until "the vehicle is complete." But, knowing that the chassis was having this body put on it, they were willing to take the risk and pay for the car. From the time when the car was complete the car belonged to the plaintiffs, and not to anybody else.

The next matter of any materiality after the payment of the cheque was that on March 8 the body was completed, and the body builders handed over the car to Mr. Wheatley. I agree that Mr. Wheatley's obligation and his liability, so far as he was concerned in this contract, began to run from March 8. This agreement was dated February 7, and the date from which the instalments were to run was the date on which the first instalment had to be made—namely, March 8. In view of this misunderstanding about the body, the true date from which this agreement ran was March 8, and if that becomes material the Court would rectify the document by inserting the true date. I do not think, however, that that is in the least material, because so soon as Mr. Wheatley put this consideration before the plaintiffs—it is true that they said they did it without prejudice—they agreed that the first instalment should not be due until April 8. April 8 came, and Mr. Wheatley paid that instalment. But he did not pay the instalments with any regularity, and he got two months in arrear by June. At some time in September, as Mr. Wheatley had not kept up the instalments, and had not kept various other promises which he had made, the plaintiffs exercised the right which they had under the hire-purchase agreement, and on September 16 they terminated the hiring and possessed themselves of the car.

Mr. Wheatley's defence, although it has no merits, is none the less one which he is entitled to raise if he can make it good. He says: "I am not under any liability. It is true I did buy "this car at some time, and it is true that I regarded myself as "under a hire-purchase agreement." I know he had paid the 110*l.*, or been allowed that, but he says: "This case is governed "by the decision in *Karflex, Ld.* v. *Poole* (1), and I am entitled, "as I understand it, not only not to have to pay anything but "to recover back all I have paid, because the plaintiffs have "no title to the car." Mr. Lawrence made every conceivable point that could be made for Mr. Wheatley, but I do not think there is any defence at all. I put to Mr. Lawrence the question: "Who do you say is the owner of the car?" Mr. Lawrence was not able to give a very satisfactory answer to that because, in my judgment, it is perfectly clear that from and after this car came into Mr. Wheatley's possession, which is all that matters, the plaintiffs were the owners of the car, and no one else was the owner. They have bought it and paid for it, and it is theirs.

Mr. Lawrence cited *Karflex, Ld.* v. *Poole* (2), but the point for consideration there was a different one from that in this case. The plaintiffs could not have been the owners of the car on February 7, which is the date that this hire-purchase agreement purports to bear. I think it was a date some time later, but the mere date does not matter, because the Court could rectify the date if necessary. *Karflex, Ld.* v. *Poole* (2), a decision of a Divisional Court, to which I was a party, was an entirely different case. There a hire-purchase company, in perfect good faith, bought the car and, in the same way as has been done here, let it out on hire to the defendant. Then, before any instalments had become due, it was found out that the person who had sold the car to the hire-purchase company had no title to it, because he had stolen it and had sold it to the hire-purchase company who, although they bought it in good faith, had no title to the car, and it was not theirs. They acquired no title to it because the man from whom they bought it was a dishonest person and had no title to it. Therefore in that case the plaintiffs were purporting to let something to Mr. Poole which was not theirs to let. The true owner said: "You have got my car; I want it back." The Divisional Court held that, in those circumstances, Karflex, Ld., could not claim the instalments due under the agreement, on the ground that they were not the owners of the car when they let it to the defendant.

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(1) [1933] 2 K. B. 251.

(2) Ibid. 251, 262.

I adhere to every word which I said in *Karflex, Ld.* v. *Poole.* (1) When a person lets goods on hire-purchase it is a condition that at the time when he lets them he is the owner of the property in question. It is true that Acton J., who was sitting with me, used the expression "at the time of the "signing of this agreement," but I do not think there was any difference between Acton J. and myself on that point. What we both emphasized was that the material time was when the bailment took place, not the actual moment of signing the agreement. If there was any misunderstanding about the matter I desire to say at once that I did not intend the words in my judgment to apply, nor do I think that they in terms do apply, to such a case as this. A man goes to another and says: "I should like to buy a particular piece of machinery, "or a particular vehicle, on hire-purchase. I cannot put "down the money. The dealer will not sell it except for cash. "Will you go and buy it for me?" To the intending purchaser the other man says: "Yes, sit down," and he makes out a hire-purchase agreement, which is then and there signed. After the agreement is signed the man goes and buys the machine, and bails it to the person who wants to get it on hire-purchase. I see nothing wrong in that, and I do not see that the transaction is void in any form. At the time when the person whom I call the customer gets the machine he gets it from a man who has a perfect right to it, but in *Karflex, Ld.* v. *Poole* (1) the customer got it from a man who had no power to deal with it.

I think it is perfectly clear that the plaintiffs in this case were entitled to give the car to Mr. Wheatley at the time they gave it to him, that is to say, in March, 1936. That being so, the only other point which remains is to see what are the terms of the hire-purchase agreement. I do not know what the terms are. The existence of the hire-purchase agreement is recognized in the correspondence between Mr. Wheatley and themselves. He writes about it, and makes payments under it. I think that this is a perfectly valid agreement. There is no question with regard to the amount of money, because it has been agreed that if the plaintiffs are right the sum to which they are entitled is 177*l.* 3*s.* 11*d.*, and for that sum I give judgment for the plaintiffs, with costs.

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(1) [1933] 2 K. B. 251, 262.

Solicitor for plaintiffs: *G. H. Drury.*
Solicitors for defendant: *Alexander Fine, Hawkins & Co.*

A. W. G.

APPEAL OF COUSENS.

1937
Dec. 10.

In re COUSENS, DECEASED.

Insurance (National Health)—Exception—"Employment in the military "service of the Crown"—Lieutenant and quartermaster in Territorial Army—National Health Insurance Act, 1924 (14 & 15 *Geo.* 5, *c.* 38), *Sch. I., Part II., para.* (*a*).

An ex-sergeant-major of the Regular Army received a commission as lieutenant and quartermaster in a Territorial unit. He received an annual salary, which was paid monthly by cheque from the county association, to whom it was later refunded by the War Office:—

Held, that he was employed "in the military service of the "Crown" and therefore came within the exception set out in Sch. I., Part II., para. (*a*), of the National Health Insurance Act, 1924, and was not an employed person within that Act.

Derbyshire County Council v. *Middlesex County Council* [1936] 1 K. B. 533 distinguished.

CASE stated by the Minister of Health under s. 161 of the National Health Insurance Act, 1936, and Order LVB., r. 2, of the Rules of the Supreme Court.

On December 9, 1935, Mrs. Lorna Cousens, of Dennison Avenue, Withington, Manchester, in accordance with the provisions of the National Health Insurance (Decision of Questions) Regulations, 1924 (S. R. & O., 1924, No. 1337), made under the National Health Insurance Act, 1924, furnished an application in writing to the Minister with a view to the determination by him of the question whether her late husband, Albert Edward Cousens, when employed as a commissioned officer in the Territorial Army from December 10, 1931, to February 14, 1935, was employed within the meaning of that Act. (1)

At a hearing before a person appointed by the Minister it was admitted or proved that Cousens was in the Regular Army from 1905 until he was discharged in January, 1930, as a company sergeant-major, acting regimental sergeant-major. From April to October, 1930, he was in civil employment, and was ill (except for short periods) from October, 1930, to December, 1931. On December 10, 1931, he received a commission as lieutenant and quartermaster in the 6th/7th Battalion of The Manchester Regiment (Territorial Army), which he held at the date of his death on February 14, 1935.

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(1) The National Health Insurance Act, 1924, Sch. I., Part II.: "Exceptions. (*a*) Employment in "the naval, military or air service "of the Crown, including service "in Officers' Training Corps, "except as otherwise provided in "this Act."

The Act of 1924 was repealed by the National Health Insurance Act, 1936 (26 Geo. 5 & 1 Ed. 8, c. 32); but exception (*a*) above set out is re-enacted verbatim in Sch. I., Part II., para. (*a*).

In accordance with para. 101 of the Regulations for the Territorial Army, 1929 (S. R. & O., 1929, No. 486) (1), the selection and nomination of Cousens as quartermaster was made by the officer commanding the unit, who, after consulting the county association, forwarded his recommendation of the appointment of Cousens as quartermaster to the General Officer Commanding-in-Chief for submission to the War Office, which accepted the recommendation. Cousens' commission was in due course approved and signed by His Majesty.

His rate of pay as quartermaster was 150*l.* per annum, with an additional allowance of 50*l.* per annum, and, in accordance with the regulations, he was paid monthly in arrear by cheque signed by the chairman of the county association, subject to a certificate signed by the officer commanding of satisfactory performance by Cousens of his duties. An annual grant was made to the association by the War Office to cover payments made by the association to Cousens under the regulations.

His duties consisted mostly of clerical work in connection with the military stores for which he was responsible, but he also issued clothing and food when the unit was in camp, and was responsible for the drill hall building, for the caretakers when the unit was in camp, and for the field kitchen. He only wore uniform on parade. Most of his instructions were received from the association, but he also received orders from the commanding officer. He had an office in the drill hall, the office of the association being in a separate building.

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(1) These were the Regulations in force at the material date. They are now replaced by 1936 S. R. & O. No. 1166, which so far as material to the present case are unaltered.

His hours of duty were fixed by the commanding officer, whose permission had to be obtained if Cousens wished to be absent. He received one month's furlough in each year. In accordance with the regulations he attended the annual training camp, and when in camp received pay in the same way as the other officers, except that in practice he was not required to perform the prescribed number of drills to qualify for such pay. He was entitled to follow any other profession, or to engage in business or hold any other appointment concurrently with his Territorial employment.

The decision of the Minister was " that the employment of "Albert Edward Cousens (deceased) from December 10, 1931, "to February 14, 1935, as lieutenant and quartermaster in the "6th/7th Battalion of The Manchester Regiment (Territorial "Army) was employment in the military service of the "Crown, and accordingly, by virtue of para. (*a*) of Part II. "of the First Schedule to the National Health Insurance "Act, 1924, was excepted from the compulsory provisions of "the said Act and was not employment within the meaning "of the said Act."

The applicant (Mrs. Cousens) appealed.

Marchington for the appellant. Cousens was not " employed "in the military service of the Crown." It is true that he held His Majesty's commission, but the responsibility for his selection rested on his commanding officer after consulting the county association. That is a very informal method of appointment compared with the appointment of officers in the Regular Army. If transferred from the Territorial to the Regular Army he ceases altogether to hold a Territorial commission.

[BRANSON J. Do you say as a general proposition that no Territorial officer is " employed in the military service of "the Crown " or is there something special which differentiates Cousens' position ?]

It is submitted that no Territorial officer employed on the same footing as a quartermaster is employed in the military service of the Crown.

Cousens was paid by the county association, which by reg. 953 is "subject to such liability as attaches to a "corporate body." It was entitled to be repaid by the War Office the sums which it distributed, but Cousens, it is submitted, was in the service of the county association as a self-contained unit.

[Branson J. Where do you find any authority for the county association to employ and maintain a private army? The association is simply the appointed channel through which the money provided by the Crown reaches the officer, but he is not employed in the service of the association.]

The Territorial Army is not liable to be called out in aid of the civil power, or to be sent abroad; persons in the military service of the Crown are subject to both liabilities.

[Branson J. That argument begs the question. Unless you postulate that every person in the military service of the Crown is liable to be sent abroad, it only shows that the duties of the Territorial Army are distinct from those of the Regular Army. It is the duty of every citizen to aid the civil power, and persons in the military service of the Crown have no special privileges if their intervention is not justified.]

In *Derbyshire County Council* v. *Middlesex County Council* (1) the Divisional Court held that a man attending his annual training in a Territorial unit was not "serving in the military "service of the Crown as a soldier" within the meaning of s. 93, sub-s. 1, proviso (*a*), of the Poor Law Act, 1930. Though not on all fours with the present case, it decided that a man in the Territorial Army differed from a man in the military service of the Crown in that he retained his civilian status, and though he might at times be subject to military law he was no more than "a contingent, or potential, "or inchoate, or embryonic soldier." Here Cousens was entitled to follow any civilian employment in his spare time. The case stated is silent on the question whether he in fact did so.

Valentine Holmes for the Minister of Health. Apart from *Derbyshire County Council* v. *Middlesex County Council* (1)

(1) [1936] 1 K. B. 533, 541.

this appeal would really be unarguable, and that case is distinguishable. The language of the Poor Law Act, 1930, is quite different from that of the Schedule to the National Health Insurance Act, 1924, and in that case, which decided that a civilian undergoing a fortnight's training in camp as a member of the Territorial Army was not "serving in the "military service of the Crown as a soldier," for the purpose of the Poor Law Act, 1930, is no authority for saying that a Territorial officer engaged at an annual salary in the circumstances described in the case stated was not employed "in the "military service of the Crown."

The language of the long title of the Territorial and Reserve Forces Act, 1907, and of s. 1, sub-s. 1, of that Act, as well as reg. 929 of the Territorial Regulations make it quite clear that Parliament regarded the Territorial Army as part of the military forces of the Crown.

BRANSON J. This case raises a short point by a case stated by the Minister of Health under s. 161 of the National Health Insurance Act, 1936. The facts are, quite shortly, that Albert Edward Cousens, after serving in the Regular Army for a number of years, received on December 10, 1931, a commission as lieutenant and quartermaster in the Territorial Army, which he held till his death in February, 1935. It is now suggested by his widow, the applicant, that he was, while so employed, employed in a way which made him insurable under the National Health Insurance Act, 1924. The question whether he was so insurable depends on whether his employment as lieutenant and quartermaster was employment in the military service of the Crown. The Minister has decided that it was, and it is now suggested that I ought to hold as a matter of law that it was not.

There is no dispute as to the facts, which show that Cousens was employed in the ordinary way in which officers in the Territorial Army are employed. His commission was approved and signed by His Majesty, and he was paid by cheque from the county association, subject to a certificate of good conduct from his commanding officer, the amount being subsequently paid to the association by the War Office.

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Branson J.

Dealing with the matter apart from authority, it seems to me that a man who holds a commission in the Territorial Army is in the military service of the Crown, but it is said that there is authority that he is not.

Mr. Marchington says that such an officer's status differs in many ways from that of an officer in the Regular Army; for instance, he cannot be called out in aid of the civil power or ordered abroad. But that only shows that he is not in the Regular Army, not that he is not in the military service of the Crown.

In *Derbyshire County Council* v. *Middlesex County Council* (1) a Divisional Court had to decide whether a member of the Territorial Army attending the annual camp was "serving "in the military forces of the Crown as a soldier" within the meaning of s. 93, sub-s. 1, proviso (*a*), of the Poor Law Act, 1930, which enacts: "Provided that any time during which "he has been—(*a*) serving in the naval, military or air service "of the Crown as a seaman, marine, soldier or airman . . . . "shall not be regarded as interrupting his residence in the "county or county borough, but shall for all purposes be "excluded in the computation of time hereinbefore mentioned."

It appears at once that the language which the Court was considering there was not the language which I have to construe here. What I have to decide is whether Cousens was "employed in the military service of the Crown," not whether he was "serving in the military forces of the Crown "as a soldier."

When one looks at the Territorial and Reserve Forces Act, 1907, it is impossible to avoid the conclusion that Parliament regarded persons in the Territorial Army as persons in the military service of the Crown. The long title of the Act begins with the words: "An Act to provide for the "reorganization of His Majesty's military forces," and s. 1, sub-s. 1, begins by saying: "For the purposes of the "reorganization under this Act of His Majesty's military "forces other than the regulars and their reserves," and proceeds to say that county associations shall be constituted.

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(1) [1936] 1 K. B. 533.

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COUSENS' APPEAL.
COUSENS, DECEASED, *In re.*

Branson J.

It seems to me as clear as possible that the Legislature regarded the force there being called into being as one of the military forces of the Crown, other than the regulars and their reserves. Sect. 3 provides that the Army Council shall pay to an association, out of money voted by Parliament for army services, such sums as, in the opinion of the Army Council, are required to meet the necessary expenditure connected with the exercise and discharge by the association of its powers and duties.

It is to my mind quite plain that the Act treats the Territorial Army as part of His Majesty's military forces. That being so, service in the Territorial Army is employment in the military service of the Crown and for that reason I think the Minister came to the right decision.

Mr. Holmes has also called my attention to reg. 929 of the Territorial Regulations, which begins with these words: "Officers and men of the Territorial Army, while acting in "their capacity as such, are persons in the military service "of the Crown, and therefore excluded from the scope of "the Workmen's Compensation Acts." That regulation is exegetical, and it might be that, if a properly constituted tribunal came to the conclusion that the author of it had not correctly interpreted the Act, it would not be binding. I use it only to draw the comforting conclusion that the view I have formed was shared by the framers of these Regulations.

In the result the appeal is dismissed, and I must certify that Albert Edward Cousens was employed from December 10, 1931, to February 14, 1935, in the military service of the Crown, and was therefore not an employed person within the meaning of the National Health Insurance Act, 1924.

Appeal dismissed.

Solicitors for appellant: *Gregory, Rowcliffe & Co., for J. Arnold Hancock, Manchester.*

Solicitor for the Minister: *Solicitor, Ministry of Health.*

J. W. H.

1938
Jan. 12.

CHAJUTIN *v.* WHITEHEAD.

Alien—Possession of altered passport—Mens rea—Defence of innocent possession—Whether available—Aliens Order, 1920 (*S. R. & O.,* 1920, *No.* 448), *art.* 18, *para.* 4 (*d*) (*as renumbered by S. R. & O.,* 1931, *No.* 715, *para.* 7).

The appellant was convicted of being in possession of an altered passport without lawful authority contrary to art. 18, para. 4 (*d*), of the Aliens Order, 1920. On appeal to quarter sessions it was found as a fact that he did not know that the passport was altered, but honestly believed, on reasonable grounds, that it had been issued to him in the ordinary course by the proper authority in a foreign country:—

Held, by the Divisional Court, that the requirements of art. 18 are imperative, and that, if a person is in fact in possession of an altered passport, it is neither necessary for the prosecution to prove guilty knowledge of the alteration, nor open to the defendant to secure acquittal by proof that he did not know, and had no reason to suspect, that the passport was altered.

CASE stated by the chairman of the appeal committee of the County of London Quarter Sessions.

On February 15, 1937, the appellant, Nathan Chajutin, was convicted at Bow Street Police Court for that he, on January 25, 1937, in relation to Detective-Inspector William Whitehead, the respondent, a person lawfully acting in the execution of the provisions of the Aliens Order, 1920 (1), did have in his possession without lawful authority a certain altered passport, contrary to art. 18, para. 4 (*d*), of that Order. The appellant was convicted and fined 40*l*., ordered to pay five guineas costs, and recommended for deportation. He appealed to the County of London Quarter Sessions against his conviction, on the ground that it was against the weight of evidence and that he was not guilty of the offence.

It was proved or admitted that the appellant was on

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(1) The Aliens Order, 1920, art. 18, para. 4: "Any person "shall be guilty of an offence "against this Order if, in reply or "in relation to any immigration "officer, inspector, registration "officer, or other person lawfully "acting in the execution of the "provisions of this Order, he ". . . . . (*d*) without lawful "authority uses or has in his "possession any forged, altered, or "irregular certificate, passport, or "other document, or any passport "or document on which any visa "or endorsement has been altered "or forged."

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January 25, 1937, in possession of a passport which purported to have been issued to him at Budapest on October 29, 1936, and that that passport had in fact been altered.

It was contended for the appellant that in order to constitute an offence against art. 18, para. 4 (*d*), of the Aliens Order, 1920, it was necessary that the prosecution should establish mens rea on the part of the appellant, and that he could not be convicted of the offence charged against him unless the Court was satisfied that he knew or should have known that the passport in question was an altered passport.

For the respondent it was contended that mens rea was not an essential ingredient of the offence charged, and that the mere fact that the appellant was in possession of the altered passport without lawful authority was sufficient to prove an offence within art. 18, para. 4 (*d*), of the Aliens Order, 1920.

The appeal committee found as a fact that the appellant did not know that the passport had been altered and honestly believed on reasonable grounds that it had been issued to him in the ordinary course by the proper authority in Budapest. The committee also held that in law it was necessary, in order to establish the offence created by art. 18, para. 4 (*d*), of the Aliens Order, 1920, that the respondent should affirmatively prove that the appellant was in possession of the passport with guilty knowledge that it had been altered.

The appellant's appeal was accordingly allowed, and the present case was stated at the request of the respondent, the question for the Court being whether the appeal committee's decision was right in law.

Vernon Gattie for the respondent. The word "knowingly" is deliberately omitted from art. 18. It is to be remembered that the Aliens Act and Orders were originally framed during the War, in a time of great national emergency, and that when they were put in permanent form after the War the drastic requirements were retained. It would obviously be impossible in most cases for the prosecution to prove affirmatively the guilty knowledge of the defendant.

[He was stopped.]

St. John Hutchinson K.C. (*Christmas Humphreys* with him) for the appellant. The proposition formulated by the appeal committee, that the prosecution must prove guilty knowledge, is not, and was not below, contended for by the appellant. It is admittedly unsustainable. The submission we make is that where a prima facie case is made out by proof of possession of a passport which has in fact been altered, the burden of proof shifts, and the defendant may then show, if he can, that he did not know and had no reason to suspect that the passport had been altered. If, as here, he satisfies the Court of that, he is entitled to be acquitted.

LORD HEWART C.J. [after reading the case :] It is to be observed that the decision in the terms in which it is expressed by the appeal committee is not even sought to be supported by the appellant. His counsel will not go the length of arguing, or indeed suggesting, that the person who makes the charge must affirmatively prove that the defendant was in possession of the passport with guilty knowledge that it had been altered. Indeed, any such proposition is manifestly incapable of being supported upon the terms of this Order ; but it is said that in the Court below a much more modest proposition of law was put forward, and was in fact accepted, and is referred to in this part of this case in language which goes far beyond its proper dimensions. That proposition is that although prima facie an offence may appear to have been committed when once it is established that a person has in his possession a forged or altered passport, the burden of proof then shifts, and it is open to the defendant not merely to show, as the article contemplates that in a proper case he may show, that he had lawful authority for possession of that passport, but also to show that he was otherwise acting innocently. As soon as that proposition is formulated it seems to me to become plain that those who support it must in one way or another re-write the relevant paragraph of this article. The article as it stands is one of a group of provisions relating to offences and penalties. [His Lordship read it.] Now this Order from time to time uses, when it intends to use it, the word "knowingly." It uses here the words "without lawful authority," and it is to be observed that the possession which is made an offence is not possession simpliciter; it is "in reply or in relation to any immigration "officer, inspector, registration officer or other person lawfully "acting in the execution of the provisions of this Order."

In my opinion the Order—the circumstances giving rise to which are sufficiently familiar—would be reduced almost to waste paper if the offence could not be established unless the prosecution proved that the person having in his possession the forged passport had guilty knowledge of the fact that it had been forged. It is not easy to see how that knowledge, except in rare circumstances, could be directly proved; but not only, in my opinion, is there nothing in this part of this article to put any such burden upon the prosecution, but the words of the article negative the view that the prosecution is required to carry such a burden.

In my opinion this drastic Order most deliberately in relation to officers and inspectors of the kind named makes it an offence (unless, indeed, there is lawful authority) that a person should even have in his possession a forged or altered passport; and it seems to be introducing extraneous matter to hold that there is a burden upon the part of the prosecution, to be discharged, I take it, by means of the evidence regarded as a whole, that at the material time the defendant had guilty knowledge of the altering or the forgery. I cannot see any such words in the Order, and the case seems to me to fall within the large and comprehensive class of cases where, if a person does the act which is prohibited by a statute, that fact imputes to him a sufficient degree of mens rea to bring it about that the offence is proved. It is manifest, as indeed counsel for the appellant appears to recognize, that the extreme proposition which the appeal committee have formulated cannot be defended; but the minor proposition seems to me also to be incapable of defence, involving, as it does, the reading into this part of the Order some such words as "unless the person is acting innocently whereof the proof "shall rest upon him" or a proviso at the end of the Order:

"provided that no person shall be guilty of an offence under "this part of this Article if it appears that he was not aware "of the alteration or forging of the passport." That seems to me to be re-writing the Order. We must take it as it is, and as it is I think that the contentions raised on the part of the respondent—on the part, that is to say, of the police officer—in the court below were right and effect ought to be given to them.

Holding that view, I think that this appeal ought to be allowed and that the case ought to go back to the court of quarter sessions with a direction that the appeal made to that court be dismissed and that the conviction appealed against be supported.

BRANSON J. I agree, and have nothing to add.

HUMPHREYS J. I also agree.

Solicitor for respondent: *Solicitor for the Metropolitan Police.*
Solicitors for appellant: *Pritchard, Englefield & Co.*

J. W. H.

CARPENTERS' COMPANY *v.* BRITISH MUTUAL BANKING COMPANY, LIMITED.

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June 25, 28, 29; *July* 29.

[1936. C. 1272.]

Banker—Cheque—Conversion—Crossed cheques stolen by clerk of true owner—Forged indorsement—Payment by clerk into bank on which cheques drawn—Direction to credit his own account—Negligence—Stamp Act, 1853 (16 & 17 *Vict. c.* 59), *s.* 19—*Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *ss.* 60, 82.

The Carpenters' Company were the trustees of a home and kept an account with the defendant bank through which they paid the expenses of that home. B. was the assistant clerk of the Company and the secretary of the committee which looked after the home. It was part of B.'s duty to obtain cheques in order to pay the tradesmen who supplied goods to the home. B. had a private account of his own with the defendant bank. In 1920 B. commenced to misappropriate cheques the property of the Company. In most cases the cheques were drawn in favour of tradesmen who had supplied goods to the home. In other cases B. forged invoices representing that goods had been supplied to the home by persons who had not in fact supplied goods and procured cheques to be drawn in payment of these forged invoices. All the cheques were crossed cheques and were duly signed by the proper officers of the Company, and B. forged the indorsements of the payees, and paid them into the defendant bank with a request that the bank would credit his private account with the amount of the cheques, which was done. In an action by the Company against the bank for the amount of the cheques Branson J. found as a fact that the bank did not act without negligence and therefore could not rely upon s. 82 of the Bills of Exchange Act, 1882, but that they paid the cheques in good faith and in the ordinary course of business notwithstanding that they had been negligent and that therefore the bank were protected by s. 19 of the Stamp Act, 1853, and by s. 60 of the Bills of Exchange Act, 1882. On appeal:—

Held (MacKinnon L.J. dissenting), that the defendant bank by receiving the cheques and placing them to the credit of B.'s private account with them had converted the cheques, and that as Branson J. had found that the bank in so doing were guilty of negligence they could not rely upon s. 82 of the Bills of Exchange Act, 1882, as a defence, and were liable to the plaintiffs as the true owners of the cheques for the face value of the cheques converted within six years before the commencement of the action.

(2.) that s. 19 of the Stamp Act, 1853, had been impliedly repealed by s. 60 of the Bills of Exchange Act, 1882, in the case of bills of exchange and cheques.

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was distinguishable, as there was a finding in that case that the bank acted without negligence.

Per Greer L.J. that s. 60 of the Bills of Exchange Act, 1882, only protected a bank when that bank was merely a paying bank, and was not a bank which received the cheque for collection.

Per Slesser L.J. that a bank might act in good faith and in the ordinary course of business notwithstanding that the bank had been negligent, and that the defendant bank as paying bank were protected by s. 60, but that as receiving bank they were liable for conversion as they could not rely upon the protection of s. 82 by reason of their negligence.

Per MacKinnon L.J. that the case was governed by the decision in *Gordon* v. *Capital & Counties Bank* [1902] 1 K. B. 242, and that therefore the bank were protected by s. 60 of the Bills of Exchange Act, 1882.

Decision of Branson J. reversed.

APPEAL from a decision of Branson J.

The plaintiffs were the Master, Wardens and Commonalty of the Mystery of Freemen of the Carpentry of the City of London, hereafter called for short "the Carpenters' Company." The defendants were the British Mutual Banking Company, Ld., of Bank Buildings, Ludgate Circus, in the City of London. The defendants had no branches and all that happened as set out hereafter took place at their one and only office.

The Carpenters' Company were the trustees of a home known as the Rustington Home, and they kept an account with the defendant bank, called the Rustington Home Account, through which they paid the expenses of that home.

The Carpenters' Company had from 1920 in their employ a man named Blackborow, who was the assistant clerk of the Carpenters' Company, and was also the secretary of the committee which looked after the Rustington Home.

From time to time moneys became due from the Carpenters' Company to tradesmen who supplied goods required for the purposes of the Rustington Home, and it was part of the duty of Blackborow to obtain cheques from the Carpenters' Company in order to pay these tradesmen. The cheques of the Carpenters' Company required the signatures of the Master and Warden and the counter signature of the clerk.

Blackborow had a private account of his own at the defendant bank. In January, 1920, Blackborow commenced to commit a series of frauds by means of which between then and August, 1935, he misappropriated or stole from the Carpenters' Company cheques which were their property to the amount of 4217*l.* 14*s.* 7*d.* In most cases these cheques were drawn in favour of tradesmen who had supplied goods to the Rustington Home, and the cheques were drawn in order to pay invoices submitted by those tradesmen. In other cases Blackborow forged invoices representing that goods had been supplied to the home by some persons who had in fact not supplied goods, and procured cheques to be drawn in payment of these forged invoices, which were therefore cheques drawn in favour of fictitious persons. All these cheques were crossed cheques and were duly signed by the proper officers of the Carpenters' Company, and Blackborow forged the indorsement of the payees and paid them into the defendant bank with a request that the bank would credit his private account with the amount of the cheques. In the early cases he stated in explanation of his so paying in cheques purporting to be indorsed by the payees that he had already paid the money represented by the cheques out of his own pocket, and that he was therefore entitled to ask that the cheques should be credited to his own account.

When the frauds were discovered, the present action was commenced by the Carpenters' Company on April 15, 1936, claiming the face value of all the cheques. The defendant bank immediately pleaded the Statute of Limitations, with the result that all the claims based on cheques prior to April 17, 1930, were barred, and the action was only concerned with the cheques fraudulently indorsed by Blackborow on and after April 17, 1930, the claim being thereby reduced to a claim of 1955*l.* 5*s.* 3*d.*

The Carpenters' Company alleged that the cheques had been received by the defendant bank as a collecting bank and that in passing them to the private account of Blackborow the bank had converted the cheques to their own use.

The defendant bank raised two defences. They said first, that the payees of the cheques were fictitious and non-existing persons, and that therefore the cheques should be treated as payable to bearer. The defendants also said that they were bankers and that they paid the cheques in good faith and in the ordinary course of business, and that the cheques purported to be indorsed by the persons to whom the same were drawn; and they relied upon s. 60 of the Bills of Exchange Act, 1882 (1), and s. 19 of the Stamp Act, 1853 (2); alternatively they alleged that the cheques were crossed cheques and that they received payment of them for a customer in good faith and without negligence, and they relied upon s. 82 of the Bills of Exchange Act, 1882.

Branson J. found as a matter of fact that the bank did not act without negligence, and that therefore they could not rely upon s. 82 of the Bills of Exchange Act, 1882, as a defence; but he held that the cheques were paid in good faith and in the ordinary course of business, notwithstanding that the bank had been negligent, and that therefore they were protected by s. 60 of the Bills of Exchange Act, 1882, and by s. 19 of the Stamp Act, 1853, which was still operative. He thought that the case was covered by the decision of the Court of Appeal in *Bissell & Co.* v. *Fox Brothers & Co.* (1) and in *Gordon* v. *London, City & Midland Bank.* (2)

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(1) Bills of Exchange Act, 1882, s. 7, sub-s. 3: "Where the payee "is a fictitious or non-existing "person the bill may be treated "as payable to bearer."

Sect. 60: "When a bill payable "to order on demand is drawn on "a banker, and the banker on "whom it is drawn pays the bill in "good faith and in the ordinary "course of business, it is not "incumbent on the banker to shew "that the indorsement of the "payee or any subsequent indorsement was made by or under the "authority of the person whose "indorsement it purports to be, "and the banker is deemed to have "paid the bill in due course, "although such indorsement has "been forged or made without "authority."

Sect. 79, sub-s. 2: "Where the "banker on whom a cheque is "drawn which is so crossed nevertheless pays the same, or pays a "cheque crossed generally otherwise than to a banker, or if "crossed specially otherwise than "to the banker to whom it is "crossed, or his agent for collection being a banker, he is liable "to the true owner of the cheque "for any loss he may sustain "owing to the cheque having "been so paid. . . . ."

Sect. 82: "Where a banker in "good faith and without negligence receives payment for a "customer of a cheque crossed "generally or specially to himself, "and the customer has no title or "a defective title thereto, the "banker shall not incur any liability to the true owner of the "cheque by reason only of having "received such payment."

(2) Stamp Act, 1853, s. 19: "Provided always, that any draft "or order drawn upon a banker "for a sum of money payable to "order on demand which shall, "when presented for payment, "purport to be endorsed by the "person to whom the same shall "be drawn payable, shall be a "sufficient authority to such "banker to pay the amount of "such draft or order to the bearer "thereof; and it shall not be "incumbent on such banker to "prove that such endorsement, or "any subsequent endorsement, "was made by or under the "direction or authority of the "person to whom the said draft "or order was or is made payable "either by the drawer or any "endorser thereof."

The plaintiffs appealed.

F. P. M. Schiller K.C. and *James Wylie* for the plaintiffs, appellants. Branson J. was wrong in holding that though the defendants were negligent, nevertheless they were protected from liability by the Stamp Act, 1853, s. 19, or the Bills of Exchange Act, 1882, s. 60.

The existing liability and immunity of banks in regard to the payment of bills and cheques may be gathered from the history of the law relating to these matters. Originally bills and cheques were payable to bearer only and a banker paying them could incur no liability. Then they became payable to order and required indorsement. The indorsement, purporting to be that of the payee, might not in fact be his, and, if the banker on whom the cheque was drawn cashed it to a person who had no right to it, he had no defence to an action by the party entitled to the cheque. In these circumstances legislation was required for the protection of bankers, and accordingly the Stamp Act, 1853, s. 19, provided that any draft or order drawn upon a banker payable to order on demand which should purport to be endorsed by the person to whom it was payable should be a sufficient authority to such banker to pay the amount to the bearer; and it should not be incumbent on the banker to prove that any endorsement was made by or under the direction or authority of the person to whom the draft or order was made payable.

A further provision for the protection of bankers was

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(1) (1885) 53 L. T. 193.

(2) [1902] 1 K. B. 242.

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introduced by the Bills of Exchange Act, 1882, s. 60, which provided that when a bill payable to order on demand is drawn on a banker, and the banker pays it in good faith and in the ordinary course of business, it is not incumbent on him to show that any indorsement was made by or under the authority of the person whose indorsement it purports to be. That section is very similar to s. 19 of the Act of 1853, but by introducing the requirements that the banker shall pay the bill in good faith and in the ordinary course of business, it is inconsistent with and in effect repeals the earlier section, at all events as regards all ordinary bills and cheques. The Act of 1882 does not, however, expressly repeal s. 19 of the Act of 1853, and the reason would seem to be that the earlier section may apply to drafts or orders which do not fall within the definitions of bills and cheques in the Act of 1882: see per Lord Lindley in *Capital & Counties Bank* v. *Gordon* (1), where the other Lords took the same view; and see also Chalmers on Bills of Exchange, 10th ed., p. 400n. A banker, therefore, is not now entitled to the protection of s. 19 of the Act of 1853 in respect of ordinary bills and cheques, but only in respect of certain special drafts or orders, such as a draft by one branch bank on another; and he is not entitled to the protection of s. 60 of the Act of 1882 unless he has paid the bill or cheque in good faith and "in the ordinary course of business."

An additional restriction on the right of a banker to cash a bill or cheque was imposed by the Crossed Cheques Act, 1876, the provisions of which were repealed by the Bills of Exchange Act, 1882, but in effect re-enacted by ss. 76 to 82 of that Act. Sect. 79 of that Act provides that where a banker on whom a crossed cheque is drawn pays it "otherwise "than to a banker" he is liable to the true owner for any loss the latter may thereby sustain. On the other hand s. 82 provides that where a banker in good faith and "without "negligence" receives payment for a customer of a crossed cheque and the customer has no title thereto, the banker shall not incur any liability to the true owner of the cheque.

(1) [1903] A. C. 240, 251.

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Apart altogether from the duties imposed upon him by statute, a banker owes to his customer and others a general legal duty to proceed with due care in all transactions in which they are concerned, and any failure on his part to observe that duty amounts to negligence. Evidence of such negligence may be obtained from the circumstances of the case, as, for example, by the banker paying a crossed cheque drawn on himself otherwise than through another banker: *Bellamy* v. *Marjoribanks* (1); or by the banker, without making any inquiry, crediting his private customer with the proceeds of a cheque indorsed by a public person: *Ross* v. *London County Westminster and Parr's Bank, Ld.* (2); and see also *Auchteroni & Co.* v. *Midland Bank, Ld.* (3) The effect of the statutes and authorities thus appears to be that a banker on whom a crossed cheque is drawn is not protected if he pays it otherwise than in the ordinary course of business, or otherwise than to a banker, or in other circumstances importing negligence on his part; and a banker who receives payment on behalf of a customer of a crossed cheque to which the customer has no title is not protected if he does so negligently. As to what amounts to negligence on the part of the banker, it has been held that a banker who, without inquiry, places to the credit of his customer, who is known to be an agent, a crossed cheque drawn by the principal and indorsed by the agent, to which the agent has no title, does not do so in the ordinary course of business and without negligence, and cannot therefore rely upon s. 82 of the Act of 1882: *Slingsby and Others* v. *District Bank, Ld.* (4); though a banker who collected a cheque signed "p.p." was held not to be negligent within the meaning of that section merely because he did not inquire into the drawer's authority: *Morison* v. *London County & Westminster Bank, Ld.* (5) It has also been held that a banker who, without inquiry, allows a customer whom he knows to be an agent to indorse and pay into his own account a crossed cheque payable to the principal departs from the ordinary course of business and is guilty of such negligence as to

(1) (1852) 7 Ex. 389.

(2) [1919] 1 K. B. 678.

(3) [1928] 2 K. B. 294.

(4) [1931] 2 K. B. 588, 598; [1932] 1 K. B. 544.

(5) [1914] 3 K. B. 356.

disentitle him to the protection of s. 82: see *Bissell & Co.* v. *Fox Brothers & Co.* (1) and *Underwood, Ld.* v. *Bank of Liverpool & Martins.* (2) *Bissell's* case (1) in so far as it decided that a banker, who placed to the credit of a customer known to be an agent a cheque payable to the principal and indorsed by the agent without authority, was protected by s. 19 of the Act of 1853 is no longer of any authority, because that section has been repealed as regards cheques by s. 60 of the Act of 1882, and moreover that case is distinguishable from the present case because there the cheque was uncrossed and s. 82 did not apply to it. *Gordon* v. *London, City & Midland Bank* (3) is distinguishable, for there was there a finding that the bank was not negligent. In the present case the conduct of the defendants amounted to negligence disentitling them from relying on any of the statutory provisions for the relief of bankers. Both the plaintiffs and Blackborow had accounts at the defendants' bank and the defendants knew that Blackborow was an agent of the plaintiffs. In these circumstances, when Blackborow brought to the defendants crossed cheques drawn or purporting to be drawn by the plaintiffs, and purporting to be indorsed by the payees for payment into his own private account, the defendants were put upon inquiry whether or not Blackborow was entitled to the cheques; and when the defendants, without making any inquiry, credited the cheques to Blackborow's account they departed from the ordinary course of business and were otherwise guilty of a lack of due care amounting to negligence which disentitled them to the protection of either s. 60 or s. 82 of the Act of 1882, and they further converted the cheques to their own use. They are therefore liable to make good to the plaintiffs the amount of these cheques.

A. T. Miller K.C. and *Valentine Holmes* for the defendants, respondents. On the facts and authorities the decision of Branson J. was right, but his findings as to negligence should be reconsidered.

Further, cases under s. 82 of the Bills of Exchange Act,

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(1) 53 L. T. 193.

(2) [1924] 1 K. B. 775.

(3) [1902] 1 K. B. 242.

1882, have been cited on behalf of the appellants which have no application to a case under s. 60 of that Act. There is a great difference between the cases arising under these two sections respectively. In a case arising under s. 82 the defendant bank has not necessarily received any mandate from its customer, whereas under s. 60 the defendant bank is the bank of the plaintiff. Under s. 60 there is an instruction or mandate to the bank, and when the cheque is brought to the bank bearing the indorsement of the payee it is equivalent to a bearer cheque.

There is a great difference between the position of a bank acting under s. 60 of the Bills of Exchange Act, 1882, when a cheque of a customer is brought to them for payment, and the position of a bank under s. 82 when they collect payment from another bank for a customer. In the latter case if the cheque is stolen the collecting bank obtains no title.

[GREER L.J. The contention on behalf of the appellants is that the respondents were both a paying bank and a collecting bank.]

On the facts of this case the respondent bank as between itself and its customer was a paying bank and not a collecting bank. The cheques were brought to the bank in the ordinary course of business and were paid in the ordinary course of business. Cases which were decided under s. 82 are not very helpful in considering the position of a bank under s. 60. There was no conversion of the cheques by the respondent bank, which had a mandate and acted on that mandate. Cheques to the amount of 400*l.* were drawn in favour of fictitious persons, but in the case of cheques drawn in favour of existing persons the question is whether the bank comes within the protection given by s. 60.

[GREER L.J. In *Bank of England* v. *Vagliano Brothers* (1) the payees were existing persons, but nevertheless they were held to be fictitious.]

Sect. 19 of the Stamp Act, 1853, and s. 60 of the Bills of Exchange Act, 1882, were inserted in those Acts in order to protect banks from the necessity of acting as detectives in

(1) [1891] A. C. 107.

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the case of their customers' cheques. Under those sections a bank is protected if it "pays the bill in good faith and in "the ordinary course of business." The course of business with regard to them ends at the time of payment. It is very different if a stolen cheque, not the cheque of a customer, comes to a bank for the purposes of collection. In that case the bank is liable unless the bank can show that it acted without negligence. The Act of 1882, when it speaks in s. 60 of a bank acting in good faith and in the ordinary course of business, does not mean the same thing as when it speaks in s. 82 of a bank acting without negligence. Cockburn C.J. said in *Charles* v. *Blackwell* (1) that the purpose of s. 19 of the Stamp Act, 1853, "was, when cheques payable to order "were expected to become general, to protect bankers against "the possibility of forged indorsements." Sect. 19 of the Stamp Act, 1853, and s. 60 of the Bills of Exchange Act, 1882, afford protection to a banker even against a charge of conversion. It is stated in Paget on Banking, 4th ed., p. 171: "Of course the banker must not be negligent; it is as much "part of his contract to take care as it is of the customer's, "and it is true that as a general rule he has himself to bear "loss accruing from his negligence. . . . . But in the very "connection in which the question might most possibly arise, "namely, the payment of a cheque with forged indorsement, "the wording of s. 60 would seem to introduce an exception "or saving in favour of the banker and hold him immune if "he has paid in good faith, albeit negligently. Sect. 60 "protects the banker in such case if he pays the cheque in "good faith and in the ordinary course of business." Sect. 90 says: "A thing is deemed to be done in good faith within "the meaning of this Act, where it is in fact done honestly, "whether it is done negligently or not." *Brighton Empire and Eden Syndicate* v. *London & County Bank* (2) is an authority for the statement that s. 60 introduced an exemption in favour of the banker if he has paid in good faith and in the ordinary course of business. The words in s. 60 "in good "faith and in the ordinary course of business" are not

(1) (1877) 2 C. P. D. 151, 156.

(2) Times Newspaper, March 24, 1904.

inconsistent with some negligence on the part of the banker. The judge has found that the bank in the present case acted negligently but that they acted in the ordinary course of business. Those findings are not mutually inconsistent. An act may be done in the ordinary course of business although done negligently. In *Bissell & Co.* v. *Fox Brothers & Co.* (1) there was a finding that the banker was negligent, but it was held that the banker was protected by s. 19 of the Stamp Act, 1853. The words "in due course" and "in the ordinary "course of business" which appear in s. 60 of the Act of 1882 are not used in s. 19 of the Stamp Act, 1853. When s. 60 used the phrase "in the ordinary course of business" it used words in contradistinction to the words "without "negligence" used in s. 82. Blackborow had been carrying on these frauds over a period of fifteen years, and the Carpenters' Company were negligent in allowing him to carry on his frauds over this period. It was held in *Morison* v. *London County & Westminster Bank* (2) that the bank were entitled to say that after a time they were "lulled to sleep" by the plaintiffs' failure to take proper precautions, and that therefore they were not liable. That case was decided under s. 82 of the Bills of Exchange Act, 1882. It was criticized by Scrutton L.J. and Sankey L.J. in *Lloyds Bank* v. *Chartered Bank of India, Australia and China* (3) and is not now good law in a case under s. 82, but the good sense that underlay that decision applies to a case under s. 60. The Stamp Act, 1853, by s. 19 gave a larger protection to bankers than they received under s. 60 of the Act of 1882. Sect. 19 of the Act of 1853 has not been repealed by s. 60 of the Act of 1882, nor has the protection afforded by s. 19 of the Act of 1853 been cut down by the later Act. Sect. 60 of the Act of 1882 contains material not to be found in s. 19 of the Stamp Act, 1853. Under s. 60 the banker "is deemed to have paid the "bill in due course" which provision is not contained in s. 19. The question of negligence does not arise in the case of a paying bank. There were twenty-five cheques drawn payable

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(1) 53 L. T. 193.
(2) [1914] 3 K. B. 356.
(3) [1929] 1 K. B. 40, 60, 74.

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to fictitious or non-existing persons. Under s. 7, sub-s. 3, of the Act of 1882 those cheques were equivalent to bearer cheques. The negligence of the plaintiffs consists in drawing these cheques over a period of fifteen years without discovering the fraud of their servant. That negligence ought to prevent the plaintiffs from recovering from the bank. In *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (1) Kennedy J. said: "Upon these facts, unless the defendants can make "good their defence of estoppel, the plaintiffs are clearly "entitled to succeed. The estoppel which is alleged is an "estoppel created by the negligence of the plaintiffs. Negli-"gence, to constitute an estoppel, implies the existence of "some duty which the party against whom the estoppel is "alleged owes to the other party. I think that the relation "of bankers and customers does involve a duty on the part "of the customer. It is not (as I understand) disputed that "there might, as between banker and customer, be circum-"stances which would be an answer to the prima facie case "that the authority was only to pay to the order of the person "named as payee upon the bill, and that the banker can only "charge the customer with payments made pursuant to that "authority. Negligence on the customer's part might be one "of those circumstances; the fact that there was no such "payee might be another." Both of those circumstances exist in the present case. The plaintiffs are therefore estopped from saying that in respect of what they did there was a conversion.

Schiller K.C. in reply. In *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (2) Kennedy J. did not say that the two circumstances mentioned would be an exemption from liability but only that they might be. The facts of that case were very like those of the present case. The only ground upon which the defendant bank can take advantage of the plaintiffs' negligence is that the fraud had gone on for a long time without the plaintiffs discovering it, and the defendants were thereby lulled to sleep. But the doctrine of lulling to sleep as it was put forward in *Morison's* case (3) has now

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(1) (1906) 11 Com. Cas. 255, 266.

(2) Ibid. 255.

(3) [1914] 3 K. B. 356.

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completely gone. Lord Tomlin said in *Bank of Montreal* v. *Dominion Gresham Guarantee and Casualty Co.* (1): "Nor, "in their Lordships' judgment, can the appellants find comfort "in the fact that the transactions complained of were incidents "in a series of similar transactions. In this connection the "so-called doctrine of lulling to sleep has been invoked. "Neglect of duty does not cease by repetition to be neglect "of duty. If there be any doctrine of lulling to sleep it must "depend upon and can only be another way of expressing "estoppel or ratification." Lord Wright also said in *Lloyds Bank* v. *E. B. Savory & Co.* (2): "I may add that the number "of the stolen cheques, and the period of time over which "they were spread, afford no justification to the appellants. "Each time they collected one of these cheques they were "converting it unless they could bring themselves within "s. 82; each time the original fault in not knowing the name "of Perkins' employers operated to deprive them of the "protection of the section. The appellants have claimed that "the repetition of cheques, all of which were dealt with before "any objection was raised by the appellants, 'lulled them to "'sleep'; and they rely on *Morison's* case. (3) I find it "difficult to appreciate on what principle that case was "decided in regard to this point; it can only be justified, if "at all, on its special facts." In order to enable a bank to escape from liability it is now necessary for the bank to make out a case of estoppel or ratification. No representations were made in this case by the plaintiffs except that the cheques were drawn in favour of persons who were not presenting them for payment. There can be no ratification unless there is knowledge of all the facts. In dealing with a case of conversion the negligence of the person who alleges that there has been a conversion is quite immaterial. The case for the defendant bank rests entirely upon the contention that they were paying bankers only. If they were also collecting bankers that defence disappears. The cheques were intended to come into the hands of the payees; as soon as

(1) [1930] A. C. 659, 666.

(2) [1933] A. C. 201, 236.

(3) [1914] 3 K. B. 356.

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they came into the hands of Blackborow he converted them. He took the cheques to the defendant bank. As the cheques were crossed cheques the defendant bank were only entitled to pay them to another banker; they were not entitled to pay them over the counter; if they did so pay them they would convert the cheques; see s. 79. In crediting Blackborow's account with the proceeds of the cheques the defendant bank did something contrary to their mandate. By so doing they collected the cheques for Blackborow. The capacity in which a banker acts is shown by the decision in *In re Farrow's Bank, Ld.* (1), where it was held that where a customer pays a crossed cheque into his bank the question whether the bank receive it as holders for value or as agents for collection is a pure question of fact. In *Midland Bank* v. *Reckitt* (2) T., a solicitor, was authorized by a power of attorney given him by a client to draw cheques on the client's banking account and to apply the proceeds for the purposes of his client. T. for his own purposes fraudulently drew fifteen cheques on his client's account with the B. bank, signing the cheques by using a rubber stamp which had on the upper line the name of the client and the word "by" and on the lower line "his attorney" and by placing his own signature between the lines. T. then paid the cheques into his own account with the M. bank. In an action by the client against the M. bank it was held by the House of Lords that the M. bank, in presenting and receiving payment for the cheques, had converted them, and that as the bank had from the form of the cheques notice as to the money not being T.'s money, they were negligent in making no inquiry as to T.'s authority to make these payments into his own account, and therefore failed to bring themselves within s. 82 of the Act of 1882. In *Lacave & Co.* v. *Crédit Lyonnais* (3) the defendant bank in Paris paid a cheque which had a forged indorsement on it and sent it to their branch in London, who credited their bank in Paris with the value, and it was held that the defendant bank by paying the cheque and forwarding it to their London bank, and crediting their Paris bank with the value, were guilty of a conversion of the cheque, and that as they had paid the cheque on a forged indorsement they were not protected by any of the provisions of the Bills of Exchange Act. In the present case no inquiry was made by the bank of the drawer but only of the fraudulent person. It was held by Scrutton L.J. in *Slingsby* v. *District Bank* (1) that it was negligence on the part of the bank to make inquiries only of the fraudulent person. It was admitted by the bank's witness that it was negligence to take the cheques without making inquiries and that none were made. When these cheques were paid by Blackborow into the defendant bank to be credited to his account, the bank ought to have been put upon inquiry, and when the practice continued over a long period, the bank ought to have become more and more suspicious and not, as they suggest, been lulled to sleep. The learned judge relied upon *Bissell & Co.* v. *Fox Brothers & Co.* (2) as showing that notwithstanding that the bank could not rely for protection upon s. 82 of the Act of 1882 as they had been negligent, nevertheless s. 60 of the Act of 1882 and s. 19 of the Stamp Act, 1853, afforded a defence to the bank. But in *Bissell & Co.* v. *Fox Brothers & Co.* (2) the cheque was not a crossed cheque, and therefore there was no necessity for it to be collected by a banker; in fact it was treated as cash, whereas in the present case the cheques were crossed cheques and were collected by the defendant bank for Blackborow. It is said on behalf of the bank that s. 19 of the Stamp Act, 1853, authorized the bank to pay these cheques without making any inquiries. Sect. 19 gives protection to a banker when it subsequently appears that he has paid on a forged indorsement, but the section does not protect a banker when a cheque is paid into a bank in circumstances which would put a prudent banker upon inquiry. Crossed cheques were not known in 1853 when the Stamp Act, 1853, was passed; they did not come into general use until 1877. Sect. 60 of the Bills of Exchange Act, 1882, only provides that it shall not be necessary for bankers to show that an indorsement was made by the person whose indorsement it purports to be; but that section does not exonerate a banker if there are other circumstances which ought to show the bank that the affair is tainted with fraud, and the banker would not in those circumstances be protected by s. 60, because he could not be deemed to have paid the cheque in due course. The defendant bank having had notice of facts which would have put any prudent banker upon inquiry cannot rely for protection upon either s. 60 or s. 82 of the Bills of Exchange Act, 1882, or upon s. 19 of the Stamp Act, 1853.

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(1) [1923] 1 Ch. 41.
(2) [1933] A. C. 1.
(3) [1897] 1 Q. B. 148.

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(1) [1932] 1 K. B. 544, 556.

(2) 53 L. T. 193.

Cur. adv. vult.

1937. July 29. The following judgments were read:—

Greer L.J. This is an appeal by the plaintiffs, whom I shall call for short "the Carpenters' Company," from a decision of Branson J. in favour of the defendants, the British Mutual Banking Company, Ld.

The Carpenters' Company had in their employ a clerk named Blackborow who from time to time was the assistant clerk of the Carpenters' Company. He was also the secretary of an institution which I will call for short the Rustington Home, the expenses of running the home being expenses which the Carpenters' Company had taken upon themselves to pay. From time to time moneys became due from the Carpenters' Company to tradesmen who supplied goods required for the purposes of the Rustington Home, and it was part of the duty of Blackborow to obtain cheques from the Carpenters' Company to pay these tradesmen. The Carpenters' Company kept an account with the defendant bank for the purposes of the Rustington Home. The cheques of the Carpenters' Company required the signatures of the Master and Warden and the counter-signature of the clerk.

Unfortunately the Carpenters' Company trusted Blackborow in the belief that he was an honest man upon whom they could rely; but in the year 1920 he began to steal the cheques, forge the indorsement of the tradesmen who were the payees of the cheques, take them to the defendant bank and hand them over to that bank with the request that they should be credited to his private account. In the early cases he stated in explanation of his using the cheques purporting to be indorsed by the payees that he had already paid the money out of his own pocket, and he was therefore entitled to ask that the cheques should be credited to his account.

The practice of paying in cheques with forged indorsements continued from 1920 down to August, 1935. The writ in the action was issued on April 15, 1936. All the claims based on cheques prior to April, 1930, were barred by the Statute of Limitations and the action was only concerned with the cheques fraudulently used with forged indorsements on and after April 17, 1930. All the cheques were crossed cheques.

The case made for the Carpenters' Company was that all the cheques in the six years before action, the face value of which was 1955*l.* 5*s.* 3*d.*, had been received by the defendant bank as a collecting bank, and that in passing them to the credit of the private account of Blackborow the bank had converted the cheques to its own use, and unless it could make out that it was protected by s. 82 of the Bills of Exchange Act, 1882, it was liable for the face value of the cheques as damages for conversion.

The case put forward in argument for the defendant bank was that it was merely a paying bank, and was protected by s. 60 of the Bills of Exchange Act, 1882.

Sect. 82 of the Bills of Exchange Act, 1882, is in the words following: "Where a banker in good faith and without "negligence receives payment for a customer of a cheque "crossed generally or specially to himself, and the customer "has no title or a defective title thereto, the banker shall not "incur any liability to the true owner of the cheque by reason "only of having received such payment."

The circumstances in which the question as to the protection afforded to a bank by s. 82 of the Bills of Exchange Act, 1882, usually arises are where the bank asking for the protection of the section is one receiving payment for a customer of a crossed cheque from another bank. It will be convenient to describe the bank which receives the crossed cheque drawn on another bank as "the collecting bank," and the bank that pays the collecting bank as "the paying bank." As I have said, in most cases that have arisen the collecting bank and the paying bank are different corporations, and the collecting bank is only protected it it deals with the cheques without negligence, whereas by s. 60 of the Bills of Exchange Act, 1882, the paying bank is protected if it pays the cheque to the collecting bank in the ordinary course of business, in which case it is deemed to have paid the cheque in due course although the indorsement has been forged or made without authority.

In the present case, as in the case of *E. B. Savory & Co.* v. *Lloyds Bank, Ld.* (1), a case arose for decision in which the collecting bank and the customer's bank which passed the cheques to the credit of the fraudulent presenter were both branches of the same legal entity. As Scrutton L.J. said in his judgment in that case (2): "Before the Crossed Cheques Act, "1876, and the Bills of Exchange Act, 1882, the defendants "would have had no answer to the plaintiffs' claim. They dealt "with the cheques in a manner inconsistent with the rights of the "plaintiffs, the true owners—i.e., they 'converted' them, and "would be liable for their face value lost by the plaintiffs . . . . "and it would be no defence that they had no reason to believe "that they were converting them." And, after referring to the question as to their protection under s. 82 of the Act of 1882, the Lord Justice said: "Before the Acts," of 1876 and 1882 "the "bank, of course, owed a duty to every owner of property "not to convert it, but that duty was absolute and independent "of reasonable care."

These observations were made in a case which was concerned with the action of two branches of the same bank. The law on this subject was stated, in a way that has never been questioned, by Lord Reading C.J. in the case of *Morison* v. *London County & Westminster Bank, Ld.* (3) All the cheques in the present case were crossed cheques, that is to say, they were cheques which were only to be paid to a collecting bank. The difficulty in this case is that the collecting bank and the bank that credited the cheques to the fraudulent presenter were not merely the same bank, but the same and only branch of that bank. In *Savory's* case (1) the Court of Appeal held the bank liable because by receiving the cheques and sending them to its branch at Wallington, it was dealing with the cheques without the authority of the true owner, the drawer of the cheques, and the Court of Appeal apparently considered that the only way in which the bank could escape liability for converting the cheques by so dealing with them was by bringing itself within the protection of s. 82. The decision seems to involve that if the bank acts both in the capacity of collecting bank and of customer's bank, it must be held guilty of conversion and liable for the face value of the cheques unless it can bring itself within the protection of s. 82. In the present case what happened was that when the cheques were presented to the defendant bank they had never ceased to be the property of the drawers, the Carpenters' Company, as they had never in fact been indorsed by the payees. The defendant bank was then asked by Blackborow to receive the cheques, and to place the amounts to the credit of his private account with it. This the bank did, and by so doing it in my judgment converted the cheques to its own use and became liable to the Carpenters' Company, the drawers of the cheques, for the face value of the cheques.

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(1) [1932] 2 K. B. 122.
(2) Ibid. 129.
(3) [1914] 3 K. B. 356.

In my judgment s. 60 of the Bills of Exchange Act, 1882, only protects a bank when that bank is merely a paying bank, and is not a bank which receives the cheque for collection. In my judgment the learned judge was wrong in treating the defendant bank as if the bank had merely been a paying bank, and in failing to apply the law of conversion to the facts proved before him. The sole question which he had to decide was whether the bank was protected by s. 82 of the Bills of Exchange Act from its liability for conversion of the cheques. He treated s. 82 as applicable to the defendant bank, but decided that it had not proved that it received payment without negligence, but on the contrary he decided that it was negligent.

(1) [1932] 2 K. B. 122.

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It was suggested in the course of the argument—I think in the first place by one member of the Court—that the finding of negligence was wrong because after so many forged cheques had been presented and debited to the Carpenters' Company the bank was entitled to suppose that the system which started in 1920 and had gone on ever since then had been passed by the Carpenters' Company, and that the bank was entitled to think that the cheques during the last six years were cheques received without negligence, because the bank was entitled to suppose that the Carpenters' Company had no objection to the long standing practice of Blackborow paying cheques made out in favour of customers to the credit of his own account. It seems to me this argument ought not to succeed. Each transaction when a cheque was presented with a request that it should be passed to Blackborow's account must fall to be determined on the facts relating to such transaction. It might well be that the earlier transactions were not fraudulent, but that the cheques concerned in those transactions were paid into Blackborow's credit with the knowledge and consent of the Carpenters' Company; but it would not follow from that that the cheque presented on April 17, 1930, was also a cheque which the bank was entitled to cash upon the assumption that the Carpenters' Company assented to its being used by Blackborow as a cheque to be paid to his credit. There are some parts of the decision in *Morison's* case (1) which appear to indicate that after a number of transactions had appeared in the books of the defrauded company, and had been passed by the auditors of the defrauded company, the bank would be entitled to think when the next cheque came in that it was freed from the necessity of any inquiry, and its failure to inquire would not be negligence. This view is inconsistent with the case of *A. L. Underwood, Ld.* v. *Bank of Liverpool & Martins.* (2)

Up to this point I have only considered the law of conversion as applied to cheques and the provisions of s. 82 of the Bills of Exchange Act, 1882. I have still to consider the meaning and effect on the facts of this case of s. 60 of

(1) [1914] 3 K. B. 356.

(2) [1924] 1 K. B. 775.

that Act. In doing so I think I should follow the views expressed by Lord Halsbury in *Bank of England* v. *Vagliano Brothers* (1), and consider both s. 82 and s. 60 without reference to any of the earlier decisions on the law of bills of exchange except in so far as they may be necessary to resolve any ambiguity in ss. 82 and 60.

In my judgment the defendant bank in this case was, as the receiving bank, liable for conversion of the cheques. It received the crossed cheques from Blackborow at a time when the Carpenters' Company as drawers were the true owners of the cheques. It dealt with the cheques at the request of the Carpenters' Company's fraudulent servant, received the cheques from him, and immediately passed them to the credit of his account. It did not in this case cash the cheques over the counter, and it is unnecessary to consider what would have been the result if instead of passing them to Blackborow's credit the bank had paid him the cash over the counter. In my opinion, though it is unnecessary to decide this in the present case, it would still as receiving bank be liable for conversion. Be this as it may, on the facts proved in the present case I think when the bank received the cheques and passed them to the credit of Blackborow's private account it converted the cheques by dealing with them as if they were Blackborow's property and immediately crediting him with the amount thereof. Inasmuch as the learned judge has rightly found that the bank was guilty of negligence in so doing, it has failed to make out any answer to the Carpenters' Company's claim for damages for conversion. This seems to me a result which is strictly in accordance with the decision in *E. B. Savory & Co.* v. *Lloyds Bank, Ld.* (2)

It remains to say something with reference to the questions discussed in the judgment as to the effect of s. 19 of the Stamp Act, 1853. I agree with the view to which Slesser L.J. called attention in the course of the argument that s. 60 of the Bills of Exchange Act, 1882, must be treated as inconsistent, so far as cheques are concerned, with the provisions of s. 19 of the Stamp Act, 1853, and the sole duty of the

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(1) [1891] A. C. 107.

(2) [1932] 2 K. B. 122

Court after the passing of the Bills of Exchange Act is to apply s. 60 of that Act. The observations of Stirling L.J. in *Gordon* v. *London, City & Midland Bank* (1) were made per incuriam, as they refer to s. 19 of the Stamp Act as if it had been part of the Bills of Exchange Act.

I have just referred to the mistake made by Stirling L.J. in *Gordon's* case (1), but the case calls for consideration from another point of view. The cheques in that case belonged to various classes, but they were all crossed cheques. Class No. 4 related to crossed cheques drawn on one branch of the defendant bank and handed to another branch for collection. As to these cheques it was held by the Master of the Rolls, Sir Richard Henn Collins, though with some difficulty, that though the defendant bank was a collecting bank as well as a paying bank, it was protected from liability by reason of s. 60 of the Bills of Exchange Act. I find it a little difficult to follow the logic of this reasoning, because the bank was no less a collecting bank because it was collecting from one of its branches for the customer and paying the money so collected for the benefit of the fraudulent presenter of the cheque; but, be this as it may, it seems to me that the actual decision does not bind me in the present case inasmuch as there was an express finding of the jury on which the Court of Appeal acted that the bank acted without negligence. It seems to me impossible to say in the present case that the bank acted without negligence. Branson J. has expressly found that it acted negligently, and it cannot, therefore, in my judgment, be heard to say when acting negligently that it was acting in the ordinary course of business within the meaning of s. 60 of the Bills of Exchange Act, 1882. The finding in this case that the bank acted negligently in my judgment distinguishes this case from *Gordon's* case. (1) I note that by para. 7 of the statement of claim the action was based alternatively on negligence. I think on this ground the decision in *Gordon's* case (1) is not an authority on which we are bound to decide that the bank having acted negligently is excused by reason of s. 60 of the Bills of

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(1) [1902] 1 K. B. 242.

Exchange Act, 1882, from the consequences of its negligence. I understand the judgment of the Court of Appeal to mean that if there had been negligence there would have been a case for conversion by the defendants as receiving bank and no protection under s. 82, and, secondly, if the defendants were forced to rely on s. 60 regarded as the paying bank they would be protected by that section; but in any event, as there was no negligence on their part, they were freed from liability if treated as paying bank.

For the reasons above stated I am of opinion, though with some hesitation, that the learned judge was wrong in holding that the bank was entitled to the protection of s. 60 of the Bills of Exchange Act, and the appeal will be allowed with costs, and judgment entered for the Carpenters' Company for the face value of all the cheques received by the bank and passed to the credit of Blackborow during the six years preceding the issue of the writ. The amount of these cheques is 1955*l*. 5*s*. 3*d*. The appeal will in my judgment be allowed with costs and judgment entered for the plaintiffs for 1955*l*. 5*s*. 3*d*. with costs.

SLESSER L.J. In this case the critical question arises whether or not the defendants have wrongfully received the proceeds of the plaintiffs' cheques and converted them. In so far as they received the plaintiffs' cheques at Blackborow's request and credited their customer Blackborow with the proceeds, which were at all times the property of the plaintiffs, they appear to me to have acted, albeit wrongly, as a receiving bank as well as in the capacity of a paying bank.

As paying banker they may well be protected by s. 60 of the Bills of Exchange Act, 1882, in so far as they acted in good faith, which is not disputed, and in the ordinary course of business. Branson J. has come to the conclusion that in all the facts of this case, which I do not repeat, they did so act in the ordinary course of business. It was argued by Mr. Schiller that in so far as the learned judge has held that they failed to show that they acted without negligence within the meaning of s. 82 of the Bills of Exchange Act that

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therefore they cannot be held to have acted in the ordinary course of business. I do not agree; negligence does not necessarily preclude the protection of s. 60, a view made clear in the case of the other requirement, of good faith, by s. 90 of the same Act, which in terms provides that "a thing is deemed "to be done in good faith, within the meaning of this Act, "where it is in fact done honestly, whether it is done negli-"gently or not." This provision is helpful, I think, in deciding whether an admittedly negligent act can be done in the ordinary course of business. In *Vagliano's* case (1) Lord Halsbury L.C., speaking of the alleged negligence of bankers evidenced by the pursuit of an unusual course of business, says: "I should doubt whether . . . . it would be possible "to affirm that any particular course was either usual or "unusual in the sense that there is some particular course to "be pursued when circumstances occur, necessarily giving rise "to suspicion." Branson J. points out in his judgment in the present case that there was nothing in the steps taken by the bank which was not in the ordinary course of business, and I agree with him.

Bissell & Co. v. *Fox Brothers & Co.* (2), which the learned judge cites, was a case decided under s. 19 of the Stamp Act, 1853, which section has no limitation of reference to payments in the ordinary course of business and therefore is of no assistance on that question in the present case. (See also the dicta of Stirling L.J. in *Gordon's* case (3), which also can only refer to s. 19 of the Stamp Act, 1853.) That section, I think, is impliedly repealed by s. 60 of the Bills of Exchange Act, 1882, in the case of bills of exchange and cheques: see Lord Lindley in *Capital & Counties Bank* v. *Gordon*. (4) But though I am of opinion that the Stamp Act, 1853, is not here applicable, I think that the judge was entitled to hold on the facts that s. 60 of the Bills of Exchange Act, 1882, applied to this case, and therefore it follows that the bankers as payers are to be deemed to have paid the bill in due course notwithstanding that the indorsement has been forged, and I so treat them.

(1) [1891] A. C. 107, 117.
(2) 53 L. T. 193.
(3) [1902] 1 K. B. 242.
(4) [1903] A. C. 240, 251.

As receiving bank, however, unless protected by statute, they were guilty of conversion and liable in trover or for money had and received, for they dealt with the cheques which, for the want of a payee, were still the property of the plaintiffs in a manner inconsistent with the plaintiffs' rights as the true owners. See Lord Lindley in *Capital & Counties Bank* v. *Gordon* (1); Collins M.R. in the same case (2); *Morison* v. *London County & Westminster Bank, Ld.* (3), per Lord Reading C.J. and per Phillimore L.J.; *Lloyds Bank, Ld.* v. *E. B. Savory & Co.* (4), per Lord Wright.

As to the protection of the Bills of Exchange Act, 1882, s. 82; I think that the judge was entitled as a question of fact to find that the bank had failed to show that they had acted without negligence.

The fact that Blackborow, an employee of the plaintiffs, wished the proceeds of the cashed cheques to be credited to his account was fully known to the cashier. True he suspected Blackborow not of forgery but of seeking to obtain secret commission for himself and mentioned his suspicions to his superior on many occasions; but the circumstances on any view were such as should have put the bank on inquiry. Nor was the repetition of the practice any excuse—neglect of duty does not cease by repetition to be neglect of duty: per Lord Tomlin in the *Bank of Montreal* case (5); and any observations to the contrary in *Morison's* case (6) on the so-called principle of lulling to sleep must now be received with great reserve.

I agree with Greer L.J. that in so far as Collins M.R. and the rest of the Court in *Gordon's* case (7) held that s. 82 of the Bills of Exchange Act, 1882, applied, and that there was no negligence, the observations of the Master of the Rolls (8) and those of Stirling L.J. (9) as to the effect of s. 60 or s. 82 were obiter and are not binding in this case on a finding that there was negligence, and the protection of s. 82 cannot be invoked by the bank at all.

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(1) [1903] A. C. 247.
(2) [1902] 1 K. B. 262.
(3) [1914] 3 K. B. 356, 365, 379.
(4) [1933] A. C. 201, 228.
(5) [1930] A. C. 659, 666.
(6) [1914] 3 K. B. 356.
(7) [1902] 1 K. B. 242.
(8) Ibid. 274.
(9) Ibid. 281.

It follows, therefore, that, on the finding of the learned judge that the bank have failed to prove that they acted without negligence, they are liable to the true owner in conversion, and that this appeal succeeds.

MacKinnon L.J. (This judgment was read by Slesser L.J.) If I were free to decide this case on principle and apart from authority, I should be of opinion that, so far as the cheques were crossed cheques, this appeal should be allowed. But having regard to a decision of this Court to which I must refer later, I think the decision of Branson J. was correct, and the appeal falls to be dismissed.

The relation of the parties is that of customer and banker. By drawing a cheque the customer issues a mandate to the banker according to its terms. If the mandate is: "Pay X "or order," that is in truth: "Pay this if it is indorsed by X." If the indorsement of X has been forged, but the cheque is paid, the mandate has been disobeyed; and the banker will be liable to make good the sum so paid unless there is some statutory provision which relieves him from liability.

If the cheque is not crossed, the statutory provision is to be found in either s. 19 of the Stamp Act, 1853, or in s. 60 of the Bills of Exchange Act, 1882. I will assume (though I do not think it is necessary to decide it) that the qualification of payment "in the ordinary course of business," added in the Act of 1882, must now qualify the immunity given by s. 19 of the Act of 1853. If these were not crossed cheques I think the only question would be whether the defendants paid them to Blackborow "in the ordinary course of business." I agree with Branson J. in thinking that they did.

It is said that in paying them they acted negligently, and for that reason they cannot be said to have paid in the ordinary course of business. I do not agree with that contention. A thing that is done not in the ordinary course of business may be done negligently; but I do not think the converse is necessarily true. A thing may be done negligently and yet be done in the ordinary course of business: the drawing of the cheques by the plaintiffs' officials in this case seems to me a crucial example.

It is not without importance to observe that the banker does owe a duty of care to his customer; they are in a contractual relation. The collecting banker, apart from legislation, owes no duty of care at all to the drawer of a cheque upon another bank. The duty not to be negligent imposed by s. 82 of the Bills of Exchange Act, 1882, upon the collecting banker is a duty created only by the section itself. That being so, it seems to me highly significant that when s. 60 was passed to limit the liability of the paying banker, the condition of his immunity expressed is only that he shall pay "in the ordinary course of business," and there is no stipulation, as in s. 82, that he shall act without negligence. But if that had been intended, seeing that the paying banker already owes a duty of carefulness to his customer, it would have been the more obvious to express it. If, therefore, any of these cheques were not crossed cheques I think the defendants would be relieved from liability by s. 60 as having paid them "in the ordinary course "of business," even if they were negligent in doing so.

As regards crossed cheques I think other considerations arise. The mandate of the customer who draws a crossed cheque "Pay X or order" makes it subject to a twofold condition: "Pay this money if X indorses the cheque and "if it is presented for payment by a banker." If the paying banker disobeys this mandate in either respect he will be liable unless there is statutory provision for his immunity. On principle, and apart from authority, I should think such a provision must be found in the sections of the Bills of Exchange Act which deal with crossed cheques.

Primarily the defendants were the paying bankers on whom the cheques were drawn. What in fact they did was to debit them to the drawers, the plaintiffs, and credit them to their customer, Blackborow; but primarily they were the paying bankers.

Now, s. 79, sub-s. 2, provides that if a banker "pays a "cheque crossed generally otherwise than to a banker, or if

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"crossed specially otherwise than to the banker to whom it is "crossed," he is liable to the true owner of the cheque. Obviously a cheque may be drawn on, say, the Midland Bank payable to a customer of that bank and crossed specially "Midland Bank." That paying bank cannot comply with s. 79, sub-s. 2, otherwise than by debiting the drawer and crediting the payee. It must be both the paying bank and the bank receiving payment. So if a cheque drawn on the Midland Bank and crossed generally is paid in by a customer of that bank, it must be entitled to pay it by debiting the drawer and crediting the payee. Their customer cannot be required to open an account at another bank in order that the Midland Bank can literally comply with s. 79, sub-s. 2, by " paying to a banker."

In the strictest analysis I think the defendants paid these cheques to Blackborow, and he paid in equivalent amounts to the credit of his account. But for the purposes of ss. 79, 80 and 82 of the Bills of Exchange Act, 1882, I think the defendants did pay the crossed cheques to a banker, id est, to themselves. And if for the purposes of ss. 79 and 80 they paid to a banker, it would seem to me to follow that, for the purposes of s. 82, they must be the banker who received or collected it. If so, when sued by the plaintiffs in conversion, I should for my own part think that the defendants must rely for their answer on s. 82, and establish that they acted in good faith and without negligence. And in that case I should think they could not set up that their primary relation to the plaintiffs being that of paying banker to customer they can rely on s. 60, and claim immunity as having paid " in the ordinary course of business."

But though this would be my own view, I think I am precluded by a decision of this Court from giving effect to it. In *Gordon* v. *Capital & Counties Bank* (1) the facts as regards cheques in Class 4 seem to me to have been indistinguishable from those in this case. The bank claimed immunity under s. 60; the plaintiff claimed that they must rely on s. 82. It was held by Collins M.R. (2) that the bank could rely on s. 60. Stirling L.J. said (1) the same. Mathew L.J. did not specifically deal with Class 4, but at the end of his judgment he expresses his agreement with the other members of the Court on this and other minor questions.

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(1) [1902] 1 K. B. 242.

(2) Ibid. 274, 275.

This decision being, as I think, directly in point, I find myself constrained to follow it, and therefore to hold that the defendants in this case can rely on s. 60 as to the crossed cheques credited by them to Blackborow's account. And this I think was the view of this case taken by Branson J. I think he was right. I therefore think that this appeal should be dismissed, though, as I have indicated, if the absence of any authoritative decision allowed me to do so I should have been in favour of allowing the appeal as regards the cheques that were crossed. To do so would, of course, involve a finding that the defendants did not act without negligence. On that, too, I should agree with Branson J.

Mr. Miller made the point for the defendants that some of these cheques were payable to a fictitious or non-existent payee, and therefore under s. 7, sub-s. 3, could be treated as payable to bearer. I do not think this makes any difference. In fact directly the cheques to order were indorsed in blank they became equivalent to bearer cheques under s. 8, sub-s. 3. Apart from that, if he can rely on s. 60 the point is immaterial to him. But even if they were all bearer cheques, but were crossed, the provisions of ss. 79 and 82 would equally apply to them.

I should have added as to *Gordon's* case (2) that nothing was said in the House of Lords (3) as to the cheques in Class 4. There was no cross-appeal about them by the plaintiff.

Appeal allowed.

Solicitor for appellants: *Sir John J. Stavridi.*

Solicitors for respondents: *White & Leonard and Nicholls & Co.*

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(1) [1902] 1 K. B. 281, 282.

(2) [1902] 1 K. B. 242.

(3) [1903] A. C. 240.

R. F. S.

Referred to. CLAYSON v. ROLLS ROYCE LD.
[1951] 1 K. B. 746

C. A.

CROSTON v. VAUGHAN.

1937
Oct. 25, 26, 27.

Motor-car—Negligence—Signal of intention to stop—Motor-car fitted with automatic stop-light—No signal given with arm—Necessity for signal with arm—Finding that two defendants guilty of negligence—Apportionment of blame—Jurisdiction of trial judge to make apportionment—Contribution between joint tortfeasors "In any "proceedings for contribution"—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), ss. 30, 45—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 6—Highway Code, cl. 37, Appendix, Part II.—Motor Vehicles (Direction Indicator and Stop Light) Regulations, 1935 (St. R. & O., 1935, No. 897), rr. 3, 9.

The Highway Code, issued by the Minister of Transport under the authority conferred by s. 45 of the Road Traffic Act, 1930, and approved by Parliament, states in para. 37, dealing with directions to drivers of motor vehicles: "Before you stop, or "slow down or change direction, give the appropriate signal "clearly and in good time."

Part II. of the Appendix to the Code, dealing with "Signals "to be given by drivers . . . . to indicate their own intentions," states that "Signals by drivers should be given with the arm "extended from the side of the vehicle at least as far as the "elbow, where mechanical indicators are not used," and an appropriate arm signal is indicated when the driver intends to slow down or stop.

Under s. 30 of the Road Traffic Act, 1930, the Minister of Transport was given power to make regulations with respect to "the appliances to be fitted . . . . for intimating any intended "change of speed or direction of a motor vehicle and the use of "any such appliance."

The Minister of Transport on August 21, 1935, made the Motor Vehicles (Direction Indicator and Stop Light) Regulations, 1935, by which a "stop light" was defined by reg. 3 as meaning "a device fitted to a motor vehicle for the purpose of intimating "the intention of the driver of the vehicle to stop or slow down."

By reg. 9: "Every stop light shall be fitted at the rear of the "vehicle and . . . . shall show a red or amber light."

In a case where the plaintiff was injured in an accident caused by the negligence of the drivers of two motor vehicles, the trial judge *held* that one of the defendants, Mrs. B., was chiefly to blame, that she was negligent in pulling up violently and faster than a car usually does and also in not giving a hand signal of intention to pull up before she pulled up, and that, if Mrs. B. had given a hand signal, no accident would have occurred. There was no appeal against the finding of negligence. The trial judge awarded that Mrs. B. should pay two-thirds of the damages and costs and another defendant one-third.

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Mrs. B. appealed against this apportionment :—

Held, by the Court of Appeal (Slesser L.J. dissenting), that, on these findings of fact, Mrs. B. was not justified in relying solely on the stop light as indicating her intention to stop.

The Law Reform (Married Women and Tortfeasors) Act, 1935, provided by s. 6, sub-s. 1, that " Where damage is suffered by "any person as a result of a tort . . . . (*c*) any tortfeasor liable "in respect of that damage may recover contribution from any "other tortfeasor who is, or would if sued have been, liable in "respect of the same damage, whether as a joint tortfeasor or "otherwise. . . . ."

Sub-s. 2 : " In any proceedings for contribution under this "section the amount of the contribution recoverable from any "person shall be such as may be found by the court to be just "and equitable having regard to the extent of that person's "responsibility for the damage. . . . ."

Held, by the Court of Appeal, that the trial judge had jurisdiction at the end of the proceedings in which it had been held that the plaintiff was entitled to recover, to entertain an application to apportion the blame between the two defendants for the purpose of fixing the contribution as between the two joint tortfeasors, and that it was not necessary that some separate formal legal proceedings should be instituted for that purpose.

APPEAL from a decision of Porter J. sitting without a jury at the Liverpool Assizes.

The plaintiff, Miss Gertrude Croston, brought an action against the defendants, Cecil Vaughan, John Henry Walker and Mrs. Isabella Buckley, claiming damages for injuries caused to her by the negligent driving of the defendants.

The plaintiff was on Sunday, April 19, 1936, a passenger in a motor-car driven by the defendant Vaughan. This car was being driven along the main road from Chester to Holywell, in North Wales. There was at the time a continuous procession of cars on that road. Five cars in the procession were referred to in the evidence. The procession of cars was moving at twenty-five to thirty miles per hour with short intervals between the five cars in question. The first car of the five was driven by a man whose name was not before the Court. Behind that car was an Austin car, driven by a Mr. Dell. The third car was a Hillman Minx, driven by the defendant Mrs. Buckley. Next came a Standard car driven by the defendant Walker, and the fifth car, in which the plaintiff was a passenger, was driven by the defendant Vaughan.

The accident happened at about 3 P.M. in full daylight in this way. The procession of cars had to stop for some reason which was unknown at the trial. Car No. 1 pulled up. The driver of car No. 2 signalled with his hand to traffic at the rear to slow down and his car stopped. Car No. 3, driven by the defendant Mrs. Buckley, also stopped, but Mrs. Buckley was slow in doing so, and then stopped, as the learned judge said, violently, the distance between car No. 2 and car No. 3 being increased from fifteen feet to about forty-five feet. Mrs. Buckley did not give any hand signal, but relied upon the stop light which automatically appeared when the foot brake was applied. The defendant Walker, who was driving car No. 4, applied his brakes, but his car ran into car No. 3, driven by Mrs. Buckley, but not very violently. The defendant Vaughan, the driver of car No. 5, started to pull out to the off side with a view to overtaking one or more cars in front, but he almost at once realized that that manœuvre was impossible owing to the oncoming traffic. He got back into the line of cars and put on his brakes hard, as the cars in front of him were already slowing up or actually stopping. He was, however, too late to prevent his car running very violently into car No. 4, causing the plaintiff to be thrown through the wind-screen and seriously injured.

Porter J. held that the defendant Mrs. Buckley was chiefly to blame for the accident, and that she was negligent in pulling up violently, that she pulled up a great deal faster than a car usually does, being proved by the fact that the distance between her car and car No. 2 was increased from fifteen feet to forty-five feet. He also thought that she was negligent in not giving a hand signal of her intention to pull up before she did pull up. She was in error in thinking that a signal with a stop light behind was any substitute for a hand signal. The learned judge held that Walker, the driver of car No. 4, was free from blame on the ground that he got no hand signal from car No. 3, and that on seeing that car No. 3 was stopping he applied his brakes as soon as he could be expected to do in the circumstances. He held that the defendant Vaughan, the driver of car No. 5, was to blame for acting as he had done, and not endeavouring to stop his car immediately. The learned judge assessed the damages at 1175*l.*, and gave judgment for that amount against the defendants Vaughan and Mrs. Buckley.

An application was then made to the learned judge under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935 (1), to award that the damages and costs should be borne by the defendants proportionately to their degrees of guilt.

Porter J. held that the words "in any proceedings for "contribution" in s. 6, sub-s. 2, of the Act, included any application made in the case and that he had therefore power to make the allocation and that it was not necessary to bring separate proceedings for contribution. He accordingly awarded that the defendant Vaughan should pay one-third of the damages and costs, and that Mrs. Buckley should pay two-thirds.

The Highway Code, 1931, issued by the Minister of Transport under s. 45 of the Road Traffic Act, 1930 (2), by para. 37, dealing with directions to drivers of motor vehicles, provides: "Before you stop, or slow down or change direction, give the "appropriate signal clearly and in good time."

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(1) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 1: "Where "damage is suffered by any person "as a result of a tort (whether a "crime or not)— . . . .

"(*c*) any tortfeasor liable in "respect of that damage may "recover contribution from any "other tortfeasor who is, or "would if sued have been, liable "in respect of the same damage, "whether as a joint tortfeasor "or otherwise. . . . ."

Sub-s. 2: "In any proceedings "for contribution under this section the amount of the contribution recoverable from any "person shall be such as may be "found by the court to be just "and equitable having regard to "the extent of that person's "responsibility for the damage; "and the court shall have power "to exempt any person from "liability to make contribution, "or to direct that the contribution "to be recovered from any person "shall amount to a complete "indemnity."

(2) Road Traffic Act, 1930, s. 30, sub-s. 1: "The Minister "may make regulations for any "purpose for which regulations "may be made under this Part of "this Act . . . . and in particular . . . . may make regulations with respect to any of the "following matters:— . . . .

"(*h*) the appliances to be "fitted . . . . for intimating "any intended change of speed "or direction of a motor "vehicle and the use of any such "appliance. . . . ."

Sect. 45, sub-s. 1: "The "Minister shall as soon as may be "after the commencement of this

Appendix. Part II. "Signals to be given by drivers and "cyclists to indicate their own intentions." "Signals by "drivers should be given with the arm extended from the "side of the vehicle at least as far as the elbow, where "mechanical indicators are not used." "Signals to other "drivers." "No. 1 'I am going to slow down or stop.' "Extend the right arm with the palm of the hand turned "downwards and move the arm slowly up and down, keeping "the wrist loose."

Motor Vehicles (Direction Indicator and Stop Light) Regulations, 1935 (St. R. & O. 1935, No. 897), made by the Minister of Transport on August 21, 1935, under the powers conferred upon him by s. 30 of the Road Traffic Act, 1930. (1)

Reg. 3: "In these Regulations— . . . . 'Stop light' "means a device fitted to a motor vehicle for the purpose "of intimating the intention of the driver of the vehicle to "stop or slow down."

Reg. 9: "Every stop light shall be fitted at the rear of "the vehicle . . . . and when in operation shall show a red "or amber light."

The defendant Mrs. Buckley appealed against the apportionment of the damages and costs.

"Act prepare a code (in this "section referred to as the 'high-"'way code') comprising such "directions as appear to him to "be proper for the guidance of "persons using roads and may "from time to time revise the "code by revoking, varying, "amending or adding to the pro-"visions thereof in such manner "as he thinks fit."

Sub-s. 2: "The highway code "and any alterations proposed to "be made in the provisions of the "code on any revision thereof, "shall, as soon as prepared by the "Minister, be laid before both "Houses of Parliament, and the "code or revised code, as the case "may be, shall not be issued until "the code or the proposed altera-"tions have been approved by "both Houses."

Sub-s. 4: "A failure on the "part of any person to observe "any provision of the highway "code shall not of itself render "that person liable to criminal "proceedings of any kind, but "any such failure may in any "proceedings (whether civil or "criminal, and including proceed-"ings for an offence under this Act) "be relied upon by any party to "the proceedings as tending to "establish or to negative any "liability which is in question in "those proceedings."

(1) See note (2), ante p. 543.

J. W. Morris K.C. and *Laurence Vine* for Mrs. I. Buckley, defendant, appellant. The appellant is not appealing against the judgment of Porter J., awarding damages to the plaintiff in the action, and the plaintiff is no party to this appeal. She is appealing against the decision of the learned judge on the subsequent proceedings for contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, sub-s. 2. The expression " proceedings for contribution " in that sub-section does not mean proceedings in the action for damages, but subsequent proceedings, and therefore, as this application was made at the time of the action and not separately, it was not an application which came within the section, and the judge had no jurisdiction to entertain it and give a decision upon it. The case of *Burnham* v. *Boyer and Brown* (1) gives no help towards determining the question whether an application made in, or immediately after, the action comes within the sub-section, because in that case there was a separate and independent application for contribution.

The learned judge was wrong in deciding on the application that the appellant should pay two-thirds of the damages awarded to the plaintiff in the action and that Vaughan the respondent should pay only one-third. The appellant was not liable for any of the damages, or at all events not for so large a share of them as the respondent. The appellant did everything, and omitted to do nothing, that it was her duty to do. Under the Road Traffic Act, 1930, and the various regulations thereunder in that behalf it was sufficient for the appellant to indicate her intention to stop or slow down by giving the stop-light signal without giving the hand signal also, and the learned judge was wrong in holding the contrary. The Motor Vehicles (Direction Indicator and Stop Light) Regulations of 1935 have statutory force, but the Highway Code has not statutory force, and therefore the stop-light signal controlled by the Regulations is of higher importance than the hand signal controlled only by the Code, and is the most effective means by which the driver

(1) [1936] 2 All E. R. 1165.

of a vehicle can indicate his intention to stop or slow down.

Moreover, the Code, in requiring that arm signals should be given where mechanical indicators are not used, implies that the arm signal need not be given where, as here, a mechanical indicator, namely a stop-light signal, is used. In compliance with the Regulations of 1935, a stop light was fitted to the rear of the appellant's car, and she duly made use of it to indicate her intention to stop.

Where, as here, a stream of traffic proceeding in the same direction is held up, and in the process of stopping one car runs into the car in front of it, the liability for the accident is prima facie that of the driver of the rear car for running so close to the car in front of him as to be unable to stop short of it, and is not that of the driver of the car in front. There is no sufficient evidence to rebut that presumption in the present case. As the defendant Walker in the car immediately behind that of the appellant was able to stop in time, so the respondent in the rear car ought also to have been able to stop in time, and the reasons why his car ran into Walker's car and caused the accident were that he was running too close to that car and that he improperly increased his speed in order to pass Walker's car instead of immediately putting on his brakes hard. The accident was due entirely, or at least chiefly, to the wrongful acts of the respondent, and he ought to bear the whole or at least the larger share of the damages.

W. Clothier K.C. and *Scholefield Allen* for Mr. Cecil Vaughan, defendant, respondent. The decision of Porter J. on the application for contribution was right. He properly assumed jurisdiction to entertain that application. He also properly held that the appellant was chiefly to blame for the accident and was responsible for two-thirds of the damages.

First, the appellant did not give any proper signal of her intention to stop or slow up. The weight of the evidence is against her stop-light signal having been given. At all events the evidence goes to show that that signal was not seen and could not be seen by either of the two drivers behind her car. Even if the stop-light signal was given, that was not sufficient without the hand signal also. It appears from the Road Traffic Act, 1930, s. 30, sub-s. 1, (*h*), that mechanical appliances for intimating intended changes of speed or direction of a motor vehicle were already in existence at the passing of the Act, and that it was contemplated that regulations would be necessary with regard to them. The Regulations of 1935 made by the Minister of Transport merely direct how and where the mechanical stop light shall be fitted to the vehicle and not how it is to be used. The Highway Code made under s. 45 of the Act of 1930 provides by para. 37 that the driver of the vehicle "before" stopping or slowing down or changing direction is to give the appropriate signal, which in such a case as this is by extending the arm. The Code thus requires the arm signal to be given before the alteration in the motion of the vehicle begins to take place. The stop-light signal, which depends upon the putting on of the brake, cannot come into operation until after the alteration in the motion of the vehicle has begun, and therefore it cannot be a substitute for the arm signal. Even if the stop-light signal be intrinsically as effective a signal as the arm signal, it does not comply with all the requirements, because it can never be given before the change in the motion of the vehicle has begun. A stop light does not comply with para. 37 of the Code for three reasons —namely, it does not give the appropriate signal, it does not (in all circumstances) give the signal clearly, and it does not give the signal in good time.

Secondly, the appellant was at fault, as the judge has found, in stopping too quickly.

The regulations which the Minister of Transport issued in 1935—entitled the Motor Vehicles (Mechanical Indicators and Stop Light) Regulations, 1935—are restrictive regulations; they do not prescribe that stop lights may be used instead of hand signals. The regulations were intended to secure uniformity in mechanical indicators. It may well be that in crowded thoroughfares the indication of an intention to stop may be given by showing a stop light, but in other circumstances the indication ought to be given earlier by an arm signal before the brakes are applied and therefore before the stop light is shown, in accordance with para. 37 of the Highway Code. The words "mechanical indicators" in the sentence in Part II. of the Appendix to the Highway Code, "Signals by drivers should be given with the arm extended "from the side of the vehicle at least as far as the elbow, "where mechanical indicators are not used," cannot include "stop lights," because if the use of mechanical signals is to excuse the use of hand signals in giving an indication of an intention to slow down or stop according to signal No. 1 in the Code the use of hand signals would also be excused in giving an indication of an intention to turn, as required by signal No. 2 in the Code. The use of a stop light does not exempt the driver of a motor vehicle from the necessity for the use of hand signals.

It is not the practice in Admiralty cases for the Court of Appeal to review the proportions in which two vessels have been held liable in damages. The judge has found in the present case that Mrs. Buckley was negligent in making a violent pull-up, and also in not giving a hand signal of her intention to stop. The judge was right in finding that the collision was due to the negligence of Mrs. Buckley, and in the circumstances he was right in apportioning two-thirds of the blame to her.

The application that was made to the judge at the end of the trial to award that the damages and costs should be borne by the defendants proportionately to their degrees of guilt was a "proceeding for contribution" within the meaning of s. 6, sub-s. 2, of the Law Reform (Married Women and Tortfeasors) Act, 1935, and therefore the judge was entitled to make the order which he made.

Laurence Vine replied.

GREER L.J. This is an appeal from an order made by Porter J. at the trial of an action for damages for personal injuries. The appeal is on the ground that when he addressed himself to the question as to the proportions in which, under the law as it now exists, he was to divide the liability for the damages payable by the two drivers of motor-cars whom he held to blame, it is said by the appellant he was wrong in distributing two-thirds of the blame to Mrs. Buckley and one-third of the blame only to Mr. Vaughan, the driver of another motor-car. In my judgment, we cannot interfere with the decision of the learned judge. This Court, in matters of this kind which usually arise in Admiralty actions, is very reluctant to interfere with the estimate formed by the judge who tried the case as to the proportion in which the damages should be distributed.

In the present case the accident happened at 3 P.M. on a Sunday afternoon, April 19, 1936, at a time when the light would be very good and anybody could see any signs, whether by light or by hand, that were made by any of the cars in what has been called the procession. In this case there was a long procession of cars, but—to borrow a word from detective stories—there were only five "suspects" whom the learned judge had to inquire into, and they were in this order. Right in front of the five was a car driven by a man whose name is not before the Court. Just behind him was an Austin car driven by Mr. Dell. Behind that was a car driven by Mrs. Buckley, which was a Hillman Minx, 10 horse-power; behind her was a Standard car driven by a gentleman named Walker, and behind him a car driven by Mr. Vaughan, in which the injured passenger was. The learned judge eliminated from these "suspects" everybody except Mrs. Buckley and Mr. Vaughan. The cars, which were proceeding in the same direction, had to come to a stop for some reason which was not proved at the trial, and Mr. Walker's car ran into Mrs. Buckley's car and the car driven by Mr. Vaughan ran into Mr. Walker's car, with the result that the plaintiff, who was in Vaughan's car, was injured. The learned judge exonerated all the "suspects" except Mrs. Buckley and Mr. Vaughan, and there has been no appeal against his decision that Mr. Walker and the other drivers had nothing to do with the accident to the lady who was in Vaughan's car.

In giving his decision the learned judge had, first of all, to determine whether or not these two were guilty of negligence bringing about the collision. It was not a case in which the action was based on a breach of any statutory regulation or on a breach of any duty imposed by rules which had the effect of statute. The sole question was whether the accident was due to the negligence of either of these two drivers or of both of them. The learned judge had, first of all, to deal with the question of liability, and in dealing with that question he said this: "There was a violent pulling-up" of Mrs. Buckley's car; that is to say, she pulled up quite suddenly and later than she ought to have done. That is the first ground on which he held her to be liable in respect of the damage suffered by the lady in Vaughan's car. Then he said: "I think she is in error in imagining that a signal "with the stop light behind is any substitute for a hand "signal." Then later he says: "I believe it to be a wise "and sensible protection for everybody whether they have "a stop light or not"—that is, to give the signal by the hand. "If she had also given a hand signal at that time, no "accident would have occurred."

I understand the learned judge there to be deciding that Mrs. Buckley was negligent in two respects: first of all, in not stopping in time, making it necessary for her to stop violently so as not to give the others behind her sufficient time to adjust their manœuvres to hers. When he says that she "stopped violently" I think he means that she stopped too late; and he also blamed her (and, in my judgment, rightly blamed her) for not having put out her arm either just immediately before the violent stop or at some earlier period when she saw that the one in front of her was going to stop. As I understand it, there is no appeal from his decision as to the liability of the drivers of these two cars; and if the appellant was going to complain that the learned judge was wrong in his findings she would have had to appeal to this Court on the question of liability and asked either for judgment in her favour or for a new trial on the ground that the learned judge misdirected himself in holding that there were two grounds of liability, two faults on the part of Mrs. Buckley, when there was, in fact, only one. In my judgment the learned judge was bound of necessity, when he was asked to distribute the proportion in which the two defendants should pay the damages, to act upon the findings he had given in respect of their liability. It would have been absurd for the learned judge to say: " Though I have found, in deciding "liability, that Mrs. Buckley was guilty of two faults, and "that the other defendant, Vaughan, was only guilty of one "fault, I am now going behind my own finding for the "purpose of distributing the damages and make an absurd "judgment wholly inconsistent with the judgment which I "have already given." In my view, we are bound by the learned judge's judgment as to liability, and we must, therefore, assume that he was entitled to approach the question of the proportion in which the two defendants should pay damages in the light of the findings which he had already given, and which are unquestioned and cannot be questioned in this Court, in respect of the liability of the two defendants. In my judgment, that is sufficient to dispose of this appeal and to induce me to say that, in my view, the appeal ought to be dismissed with costs.

There has been a good deal said about the effect of the Statutory Rules and Orders made under the Road Traffic Act, 1930, and of the Highway Code which was made under the provisions of the 1930 Act. I do not find it necessary to refer to the provisions of the statute, but I want to say this with reference to the Statutory Rules and Orders: that though, of course, they can be used as a guide to see whether there ought to be a finding of negligence or no negligence, when nothing is done except putting the light on and putting it on too late, I disagree with the view that a compliance with the requirements of the Statutory Rules and Orders would prevent a finding of negligence. They do not provide that in any way, and a learned trial judge (or, it may be, a jury) is not confined to the question whether the action of the driver is consistent or inconsistent with the Regulations. The Highway Code is not binding as a statutory regulation;

it is only something which may be regarded as information and advice to drivers. It does not follow that if they fail to carry out any provision of the Highway Code they are necessarily negligent. The Road Traffic Act provides that a failure to observe any provision of the Code may in any proceedings be relied upon as tending to establish or rebut any liability which is in question in those proceedings. Nor is it sufficient excuse for any person to say, in answer to a claim for negligence, that he carried out every provision of the Code.

I attach some importance to Rule 37 of the Highway Code as a matter which can be regarded as good advice to people in charge of motor-cars. Rule 37 says this: " Before you "stop or slow down or change direction, give the appropriate "signal clearly and in good time." Now before a car begins to slow down it cannot give an " appropriate " signal of any sort by means of the stop light, because the stop light will not come into operation until the brake is applied and, therefore, I gather that this piece of advice means: " Before you put "on the stop light give an appropriate signal." The signals are all dealt with in the Appendix to the Code, which shows the kind of signals which is "appropriate" for the various occasions.

Now it is said that no careful driver ever gives any signal with his arm when he has a stop light. The learned judge has had great experience as a driver of cars, though he is not a professional driver, and there is no member of this Court, or, I suppose, no one who owns a car, who has not had a very large experience of sitting either behind or beside a competent driver, and it seems to me to be the custom of the really careful driver to give the hand signal when he is about to slow down. It is, as Porter J. said in his judgment, more readily observed than the signal by the stop light; it is higher up, for one thing; the hand is just level with the eye of the driver of the other car. I think the learned judge was entitled to say that the absence of a signal of that kind at a time when it ought to be given, i.e., before the sudden putting on of the brake, was sufficient to enable him to hold that in that respect Mrs. Buckley was to blame as well as for putting on her brake too late before the collision, and that being so, I think it is impossible to disturb the decision of the learned judge on the question of the proportions of blame.

For these reasons, I think the appeal should be dismissed, and with costs.

SLESSER L.J. This is an appeal in a matter arising under s. 6, sub-s. 1 (*c*), of the Law Reform (Married Women and Tortfeasors) Act, 1935, which provides, among other matters, for contribution between joint tortfeasors. Ever since the well known case of *Merryweather* v. *Nixan* (1) and other cases which have followed it, it has been undisputed as a general rule that at common law as between joint wrongdoers themselves one who has been sued and compelled to pay the whole damages has no right to indemnity from the other joint tortfeasor. But the law has now been altered. In the present case there is no question but that the plaintiff, Miss Croston, was entitled to recover as against the two alleged wrongdoers, Mr. Vaughan and Mrs. Buckley, and before 1935, as I have said, no question of contribution as between them could have arisen. But now the law is otherwise. In this case, after it had been decided that Miss Croston was entitled to recover, an application was made to the Court that the learned judge should fix the contributions as between the two tortfeasors so found, Mrs. Buckley and Mr. Vaughan. In my opinion, that procedure was one which was properly within the learned judge's jurisdiction in that it was a proceeding for contribution within the meaning of s. 6, sub-s. 2, of the 1935 Act which, having laid down in para. (*c*) of sub-s. 1 the liability for contribution, provides in sub-s. 2 that: "In "any proceedings for contribution under this section the "amount of the contribution recoverable from any person "shall be such as may be found by the court to be just "and equitable having regard to the extent of that person's "responsibility for the damage." I am satisfied on the authorities that this application was in the nature of a proceeding; it was a lis arising out of the original action

(1) (1799) 8 T. R. 186.

and was a proceeding which comes within the language of the section, as decided in such a case, for instance, as *Hood-Bars* v. *Cathcart.* (1)

In those circumstances, I agree that this Court would be very loath to disturb the proportion of contributions as between the tortfeasors which has been assessed by the learned judge, and, bearing in mind the cases which have arisen in Admiralty law as regards both the earlier question of contribution, when the contributions were equal, and the present provisions under the Maritime Conventions Act, 1911, the matter would normally be one entirely for the discretion of the judge, with which this Court would not interfere. The matter is brought before us, however, as I understand the argument of Mr. Morris, upon this footing. Mr. Morris says that the learned judge, in fixing the respective contributions, which are a two-thirds liability on the part of Mrs. Buckley and a one-third liability on the part of Mr. Vaughan, has proceeded upon incorrect principles in law and, therefore, that he is not asking us merely to disturb a matter which would primarily be within the learned judge's discretion. He says that the learned judge has taken into account matters which he should not have taken into account in assessing the liability of Mrs. Buckley. As regards one of the arguments of Mr. Morris, speaking for myself I am entirely against him. I think it was within the competence of the learned judge and for him to decide the manner in which this accident happened. He saw the witnesses and he is the best judge of the credibility of their accounts of the occurrence; and he has found, and I accept his finding, that Mrs. Buckley was wrong in saying there was no violent pull-up of her car, following, as she was, Mr. Dell. He states his reasons for coming to the contrary conclusion, and finally states that there was a violent pull-up and that she pulled up a great deal faster than a car usually does. So far, as I say, I am against Mr. Morris's contention that there is anything to be considered on this appeal to contradict that finding of the learned judge. The learned judge gives his reasons, such

(1) [1894] 3 Ch. 376.

as the widening of the distance between her and Mr. Dell and the like, into which I need not go, because I accept the learned judge's finding on that part of the case.

But the learned judge has found a second ground of liability on the part of Mrs. Buckley. He said that: "She is in "error in imagining that a signal with the stop light behind "is any substitute for a hand signal." During the evidence Mrs. Buckley, being taxed with her failure to give a manual warning of her pulling-up, said she considered that the stop light (which is automatically kindled when the brakes are in the least degree put on) was a sufficient reason for her not using a manual signal. As I read the learned judge's judgment, he took that into account in assessing her degree of liability; that is to say, he took into account that she was liable on two heads, not merely that if she had used the hand signal there might not have been an accident, but that she was negligent in not using a hand signal. He took that into account in assessing her degree of contribution, and if Mr. Morris is right in saying he should not have taken that into account, then I think that the factors which operated in his mind are appealable on the question of law, that he allowed his mind to be influenced in part by an ingredient which should not have entered into his consideration.

Now, therefore, I approach this question whether or not there is in itself any liability in not using a hand signal when the car has affixed to it a red stop light—apart altogether from the fact that this lady, as is conceded by there being no appeal against the decision in favour of the plaintiff, was negligent in her manipulation of the car. Did her negligence include or extend to her failure to use the hand signal? I have come to the conclusion, with some hesitation, that, having regard to the fact that negligence necessitates a failure of duty, there was no failure of duty on the part of this lady in not using a hand signal. The reason why I come to that conclusion is this. By s. 30, sub-s. 1, of the Road Traffic Act, 1930, power is given to the Minister of Transport to make regulations, and one of the regulations which the Minister may make is with respect to

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"the appliances to be fitted . . . . for intimating any "intended change of speed or direction of a motor vehicle "and the use of any such appliance." In accordance with that power the Minister duly made the Motor Vehicles (Direction Indicator and Stop Light) Regulations, 1935, dated August 21, 1935, in which he defines "such appliance" under the name of a "stop light" in the following terms: "'Stop light' "means a device fitted to a motor vehicle for the purpose of "intimating the intention of the driver of the vehicle to stop "or slow down." There follow other regulations dealing with another kind of mechanical device called a "direction in-"dicator," with which we are not here concerned, for "intimating the intention of the driver to change the "direction of the vehicle to the right or to the left," and a number of other regulations providing for the size and position of indicators and stop lights, thus: cl. 9: "Every stop light shall be fitted at the rear of the "vehicle . . . . and when in operation shall show a red or amber light."

In so far as the Legislature has given power to the Minister to make regulations, which he has made, with respect to a device fitted to a motor vehicle for the purpose of intimating the intention of the driver to stop or slow down, it seems to me that, where the driver avails him- or herself of a device which complies with the regulations, he or she has sufficiently intimated his or her intention to stop or to slow down. Having so intimated her intention, I find it difficult, if not impossible, to say she has committed a breach of duty when, by having the appropriate appliance fitted to her motor car for the purpose of intimating her intention to stop or slow down and by putting that appropriate appliance into action, she has done that which the Legislature and the regulations say is sufficient to perform the duty of intimating the intention. Mr. Clothier has said that one must distinguish between the act of putting on the brake which produces the red light and the preliminary intention to slow down. The regulation seems to make no such distinction. It speaks of a device—not for intimating the fact that the driver is stopping or slowing down, but for intimating the intention of the driver to stop or slow down. I assume that the reason for that is that the Legislature, or the draftsman of these regulations, took the view that the intention to slow down, as an overt intention, is immediately expressed by the application of the brake and that there is no anterior time to be considered before that; at any rate, that appears, having regard to the legislation and the regulations, to be a sufficient compliance with the law.

It is true that we were referred to a Code called the Highway Code which also derives authority from the Road Traffic Act, 1930, but, unlike the regulations, is only of legal effect to this extent, that a failure on the part of a person to observe a provision of the Code shall not render the person liable to criminal proceedings, but any such failure may in any proceedings be relied upon by any party to the proceedings as tending to establish or negative any liability. But, speaking for myself, I find nothing in this Code inconsistent with the statutory regulations to which I have referred —namely, that the stop light is an appropriate means of intimating the intention of the driver to stop or to slow down.

The reason why I come to that conclusion is this. During the case I had occasion to ask for, and was supplied with, the earlier Highway Code which apparently was made before the passing of the regulations dealing with stop lights. At that time, without qualification, it was required of persons who wished to stop or slow down or change direction that they should give an appropriate signal which was in the nature of a manual signal, both in the case of slowing down and stopping, with the arm, and also different manual signals and arm signals for direction; but after the passing of these regulations, or about the time at which they were made, there was a limitation made upon those suggestions in the Highway Code, and it now reads that "signals by drivers "should be given with the arm extended from the side of the "vehicle at least as far as the elbow, where mechanical "indicators are not used." It was argued by Mr. Clothier that "mechanical indicator" there is limited to a direction indicator: I am unable to accept that view. The directions which follow with regard to the use of the arm are indifferently applied both to signals to slow down and to stop on the one hand and to turn on the other, and I see no reason why the words "mechanical indicator" are not sufficient in connotation to include both the direction indicator and the indicator of slowing down or stopping. At any rate, I find nothing in these regulations inconsistent with what I believe to be the regulation as to the stop light, that it is a device of a certain type permitted by Parliament to intimate the intention to stop or slow down.

In these circumstances, excluding the liability of this lady, which I say is undoubtedly proved, for stopping suddenly, what further liability has she with regard to her failure to put out her arm? I can find none. The learned judge says that if she had given a hand signal at the time no accident would have occurred. Equally, I suppose, it might be said that if the red light had been observed at the time no accident would have occurred. With regard to the distinction which Mr. Clothier makes that she could have given the hand signal earlier than she started to put on the brake, I cannot find in the learned judge's judgment that he took that fact into his consideration at all. What he does say is that a hand signal is easier to see than a light. He says: "I think she is in "error in imagining that a signal with the stop light behind "is any substitute for a hand signal. It is quite impossible "for people behind seeing a stop light to know what to do "anything like so well as they do with a signal given by "hand." That does not seem to me to draw any distinction in point of time but to point to a distinction in the clarity of the signal given, a distinction which, as I have said, in my view the Legislature has not accepted.

Therefore, with diffidence, as being constrained to differ from my Lord on this point, I think that the learned judge ought not to have taken into his consideration the fact that this lady, though pulling up abruptly, failed to use a hand signal, which obligation I think she had no duty to perform. If the failure to put out her hand has been one of the causes of the accident, then she has already paid for that failure in the damages which she has to pay for pulling up violently. If, otherwise, it is to be treated as a separate ingredient of liability then, as I say, I think its inclusion is erroneous and I think that on that view, if it be erroneous, to include it as an additional ground for liability is really to make her pay, so to speak, twice over for the same offence.

In my view, therefore, having regard to the fact that the learned judge has also found Mr. Vaughan liable, for reasons which my Lord has stated and which I need not repeat, for one-third of the damages, I think myself that the contributions ought to be adjusted, and, for want of any better guidance, I would be inclined to take the view expressed in the Maritime Conventions Act, 1911, s. 1, sub-s. 1 (*a*), which provides that "if, having regard to all the circumstances of the case, it is "not possible to establish different degrees of fault, the "liability shall be apportioned equally."

In my view, this appeal should be allowed, and the contribution adjusted, making the liability of Mrs. Buckley and Mr. Vaughan equal.

GREER L.J. In giving judgment I ought to have dealt with the question which has been faintly argued as to whether the application to the learned judge was within the powers of s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. I need not say anything more about it now except that I agree with the view which has been so clearly expressed by Slesser L.J.

SCOTT L.J. This appeal raises two questions of importance, one as to the duty of motorists in regard to signals by drivers, and the other as to the provisions contained in s. 6, sub-s. 2, of the Law Reform (Married Women and Tortfeasors) Act, 1935, which is intended to give effect to the right of contribution between joint tortfeasors conferred by sub-s. 1, para. (*c*), of that section. My Lords have stated the facts broadly and I can refer to them briefly. [His Lordship restated the facts shortly and continued :] It is unnecessary to repeat the allegations of negligence in the statement of claim ; it is sufficient to record the findings of the learned judge. He took the view that the person chiefly to blame was Mrs. Buckley, the driver of car No. 3, and that her negligence consisted essentially in violently (by which I think he meant very suddenly) pulling up without sufficient notice to car No. 4, which was just behind her. That she was too late in applying her brakes he regarded as proved by the fact that whereas in the moving procession there had been a distance of only fifteen feet between her car and car No. 2, there was a very much larger distance (which the learned judge put at forty-five feet) between them when the cars were pulled up. He found as a fact that she pulled up a great deal faster than a car usually does and, as I have said, called it a violent pulling-up. He also blamed her for not giving a hand signal of her intention to pull up before she did pull up, again showing that in his opinion she was late in taking action. I will come back to the question of signals in a moment. The learned judge held that Mr. Walker, the driver of car No. 4, was free from blame on the ground that he got no hand signal from car No. 3, and as soon as he saw that car No. 3 was stopping he applied his brakes as quickly as he could be expected to do so in the circumstances. Vaughan, the driver of car No. 5, the learned judge held to blame, these being the circumstances. Before Vaughan knew that the cars in front were stopping he had put on his brakes slightly and started to pull out to the off side with a view to overtaking one or more of the cars in front; but the off side of his car was only very slightly outside the line of the car in front when he saw that there was oncoming traffic which made the manœuvre impossible. He realized that he had to get back into the line and did so, but in the meantime the cars in front of him were already engaged in slowing up or actually stopping. He put his brakes on hard, but was too late to stop his car and ran into car No. 4, causing the plaintiff to be thrown through the wind-screen, as I have stated.

I now come to the matter of signals, because it is on this aspect of the case that the question of general importance arises. Under the Statutory Order No. 897 of the year 1935 containing regulations for road traffic and motor vehicles, which is entitled "The Motor Vehicles (Direction Indicator "and Stop Light) Regulations, 1935," mechanical devices for intimating the intention of the driver to change direction, or stop or slow down, were duly authorized pursuant to the statutory powers to make regulations. No question arises as to the direction indicator with which we are all now familiar, but only as to the stop light. That light, as all motorists know, shows red at the rear of the car or amber at the rear of the car, but it is usually (perhaps always, so far as I know) operated by putting on the brakes and does not show at all until the brakes are put on. Rule 3 of the regulations says that "'stop light' means a device fitted to "a motor vehicle for the purpose of intimating the intention "of the driver of the vehicle to stop or slow down." That wording invites two criticisms. The first is that the showing of the stop light is necessarily ambiguous in that it does not indicate whether the driver is intending merely to slow down or is intending actually to stop. The facts of the present case seem to me to suggest the desirability of a reconsideration from the technical angle of the question whether an ambiguous intimation such as that is sufficient to ensure the safety of a following vehicle. On this matter it is noticeable that in Part II. of the Appendix to the Highway Code, issued by the Ministry of Transport with the authority of Parliament pursuant to s. 45 of the Road Traffic Act, 1930, the "hand signal No. 1" is equally ambiguous with the "stop light," as it is entitled, "I am going to slow down, or stop." On the same page of the Code, immediately above "signal No. 1," Part II. is entitled, "Signals to be given by drivers," (then are immaterial words) "to indicate their own intentions," followed by this sentence, "Signals by drivers should be given with "the arm extended from the side of the vehicle at least as "far as the elbow, where mechanical indicators are not used." It was argued before us with force, and the argument has been accepted by my brother Slesser, that when a car has a mechanical stop light the obligation to give a hand signal

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is by the Code dispensed with, and that, therefore, the learned judge was wrong in law in holding Mrs. Buckley to blame for not giving such a hand signal in sufficient time before she put on her brakes. I will deal with the suggested exemption from the duty of giving hand signals in a moment; but I want here to emphasize the inadequacy of the warning given by the stop light in such circumstances as occurred in the present case. No. 2 vehicle had no stop light, the driver of it gave the arm signal, and this was, or could have been, observed by Mrs. Buckley in car No. 3. Her car had a stop light, so had car No. 4. Both of these stop lights were operated solely by the automatic device of putting on the foot brakes. Until the brake was applied no light could show; if the brake was applied too late the light was shown too late, and, in any event, the showing of the light did not give any indication of itself as to whether the car showing it was being braked slowly or violently, being actually stopped or only slowed down. The result was that the learned judge felt bound to acquit car No. 4 of any blame for not realizing earlier that car No. 3 was suddenly stopping. He held Vaughan, the driver of car No. 5, to blame for thinking that he could pass on the right and overtake the vehicle in front with the result that he did not make sufficiently immediate preparations to enable him to stop his car on his return to the line; but in dealing with Mrs. Buckley's negligence in car No. 3, the learned judge added that had she given a hand signal "at that time," by which I think he means before she put her brakes on, no accident might have occurred, because Mr. Walker in car No. 4 would have had time to pull up, and afterwards Mr. Vaughan in car No. 5 would also have had time to pull up. He does not say this in terms, but this I take it to be the meaning of his judgment. In the result he blamed Mrs. Buckley on the two grounds that, as he put it, "she pulled up too quickly and did not give a hand signal." On the issue of fact I should be quite unwilling to differ from the trial judge, who has seen the witnesses, particularly as I cannot help knowing from my own experience that Porter J. is an experienced driver himself and, therefore, approached the questions in the case with intimate knowledge. Further, I do not agree, for reasons which I will mention shortly, with Slesser L.J.'s view that the stop light regulations should be interpreted as exonerating a driver from the duty of giving any other signal. But even if his view of the law on that matter were correct (and I humbly disagree with him) my view of the learned judge's findings on the facts is that Mrs. Buckley was actively negligent in not taking action early enough when the driver of the car in front of her gave the hand signal No. 1 of the Code and then stopping her car with dangerous suddenness. The learned judge's real view seems to me to be an alternative. Either she could have stopped much more gradually, in which case car No. 4 would have had notice and would not have run into her and car No. 5 would not have run into car No. 4, or, if she was going to stop very suddenly, she was gravely to blame for giving no intimation at all to the cars following her of what she was going to do before she did it and that she could and ought to have done so by an arm indication. I think the judge's view of the degree of blame attaching to her might well be regarded as equal in either of those two alternatives; so that, even if Slesser L.J.'s view of the effect of the statutory regulations in Order No. 897 were correct, and that the arm signal is dispensed with in law where the mechanical signal is shown, I should see no reason to differ from the estimate of her blame at which the learned judge arrived.

But the question raised by Slesser L.J. seems to me to be one of great general importance. I cannot think that the mechanical directions contained in Statutory Order No. 897 of 1935 were intended to relieve drivers from, what I may call, common-sense action in emergencies. The position under the Code and the Regulations seems to me to have a certain analogy to that under the Regulations for Preventing Collisions at Sea. Those Regulations, as practitioners in the Admiralty Court know very well, are very detailed and very full, expressing the results of a century or so of experience both by skilled navigators and by Admiralty judges. They contain many

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positive rules which it is the duty of a navigator to obey, but at the end there is art. 29, which reads as follows: "Nothing "in these rules shall exonerate any vessel, or the owner, or "master, or crew thereof, from the consequences of any "neglect to carry lights or signals, or of any neglect to keep "a proper look-out, or of the neglect of any precaution which "may be required by the ordinary practice of seamen, or by "the special circumstances of the case." I think that the Code and the regulations contained in Statutory Order No. 897 of 1935 still leave upon every driver a common law duty of taking appropriate action outside the Code and the regulations in circumstances where it becomes essential. I appreciate that signals different in kind to the regulation signals might be a cause of danger, and that conformity to one set of signals is of importance; but, at the same time, if in a particular case where the driver sees or ought to see a probable need of actually stopping but does not at once show his stop light, or where he sees the need of immediate stopping even if he has begun to slow down and is, therefore, showing his stop light, he should, in my view, indicate his intention by an appropriate arm signal. We have all had occasion to see an arm signal made very vigorously by repeated quick movements; such a signal arrests the attention of the following motorist at once. Had such a signal been given by Mrs. Buckley in the present case, then, as the learned judge says, there would probably have been no accident. I think that he was, therefore, right in saying that she was to blame for not giving it, and that the justification for his view is that there is a common law duty of care upon a following car which is not expressed either in the Code or in the regulations. Whether that duty has been adequately performed, or has been broken, is a matter for the appreciation of the tribunal in all the circumstances of the case. In the present case I respectfully agree with the learned judge.

The other point of importance in this appeal is the question of procedure, which was raised before us, and is the question whether the learned judge had jurisdiction at all to enter upon the task of apportioning the blame between the two co-defendants whom he had held liable without some separate formal legal proceedings being instituted. I agree with the judgment delivered by my colleagues on this point, holding that he had jurisdiction and that it was the intention of sub-s. 2 of s. 6 of the Act of 1935 that the trial judge should deal with the matter, and that he had power to dispense with any formal application. And I am inclined to think that it was open to the learned judge, even if one of the parties had dissented, to exercise the jurisdiction of that section if he thought fit. Reading that section as a whole, I think it was the intention of Parliament that the judge who had heard a case of primary liability at the instance of a plaintiff should, with the knowledge of the facts as proved in evidence before him, then and there assess the apportionment not merely of the damage, but also of the blame. The sub-section is, it is true, illogical, because it assumes the joint liability of two tortfeasors, which indeed is the postulate of the proceedings for contribution; but goes on to give the Court power to exempt one of such persons from liability to make any contribution at all, or, conversely, to make the other person pay the whole. In Admiralty the Maritime Conventions Act, 1911, is worked in this country, as I know is the case also in the jurisdiction of other countries which have the proportional rule, by apportioning the blame for injury done in the main action, and the curious ambiguity created by s. 6 of the 1935 Act cannot arise; but in spite of the illogical details of the language of sub-s. 2, I think that that section should be read as giving the judge, on the evidence that he has heard, complete jurisdiction to assess the blame of each tortfeasor just as if he had held them liable as defendants to the plaintiff only for that portion of the blame. It is possible that the Rule Committee might with advantage consider whether any Rules could or should be framed for the purpose of minimizing procedural difficulties in carrying out what seems to me to have been the intention of Parliament under sub-s. 2.

In the result, I agree with the judgment delivered by Greer L.J. and am of opinion that the appeal should be

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dismissed, the proportions fixed by the learned judge for apportioning the blame between the two defendants being affirmed. Conversely, I respectfully disagree with the conclusion of Slesser L.J.'s judgment that, in view of the interpretation which he puts upon the stop light regulation, the damages should be apportioned in equal halves.

Appeal dismissed.

Solicitors for the appellant Mrs. Buckley: *Amery-Parkes & Co.*

Solicitors for the respondent Vaughan: *William Charles Crocker, for Buckley, Pidgeon & Co., Liverpool.*

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CORBETT *v.* COMMISSIONERS OF INLAND REVENUE.

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Revenue—Income tax—Sur-tax—Life tenant of residuary estate—Payment of sums on account by executors before residue ascertained—Not a payment of income of residue—Not liable to sur-tax.

An assessment to sur-tax in respect of an income of 31,239*l.* was made on the respondent, L. C., for the year ending April 5, 1935. The assessment included a sum of 17,073*l.*, being the gross equivalent of a sum of 13,600*l.* 13*s.* 9*d.* placed to the credit of Mrs. D. G. C. (the respondent's wife) by the executors of the will of her late father, R. G. Mrs. D. G. C. was entitled to a life interest in three-fifths of the residuary estate of R. G., who died on April 22, 1934. The residuary estate was made up by the executors as at May 7, 1935, and evidence was given at the hearing, which the Commissioners accepted, that it could not have been made up at an earlier date. In the balance sheet and income account as at April 5, 1935, kept by the executors there appeared the sum of 13,600*l.* 13*s.* 9*d.* placed to the credit of Mrs. D. G. C. This sum, with the appropriate addition of income tax thereon, amounted to the sum of 17,073*l.*, which was included in the assessment under appeal. On behalf of the respondent it was contended (1.) that the residue of the estate of the testator was not ascertained before May 7, 1935, (2.) that prior to the ascertainment of the residue no income within the meaning of the Income Tax Acts arose or accrued to the respondent's wife from the estate of the testator; (3.) that no part of the 13,600*l.* 13*s.* 9*d.* was received by the wife of the respondent as income; and accordingly (4.) that the assessment made on the respondent for the year 1934–35 was excessive by the amount of 17,073*l.* It was contended on behalf of the Crown (*a*) that the respondent's wife had received at least the 17,073*l.* above referred to, (*b*) that the tenant for life, the respondent's wife, could only receive income, (*c*) that any sum received by the respondent's wife or credited to her formed part of the respondent's income for super-tax purposes. The Commissioners upheld the contention of the Crown, but the figures having been agreed they reduced the assessment to 26,305*l.*

On appeal Lawrence J. held that Mrs. C. was not entitled to anything until the residue was ascertained, and that the sum which she then received, representing the share of income which had accrued during the period of administration, was not received as such income but a sum equal to the income, and the amount was therefore wrongly included in the computation of sur-tax.

On appeal by the Crown:—

Held (affirming the decision of Lawrence J.), (1.) that the case was governed by the principle laid down by the House of Lords in *Dr. Barnardo's Homes* v. *Special Commissioners of Income Tax* [1921] 2 A. C. 1, that until the residue was ascertained in due

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course of administration the beneficiaries had no title to that residue, and (2.) that the existence of the rule in *Allhusen* v. *Whittell* (1867) L. R. 4 Eq. 295 did not alter the fundamental fact that during the period of administration the income was the income of the executors and of no one else.

Decision of Rowlatt J. in *Marie Celeste Samaritan Society of the London Hospital* v. *Inland Revenue Commissioners* (1926) 11 Tax Cas. 226 approved.

APPEAL from a decision of Lawrence J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 7, 1936, the Rev. Lionel Corbett (hereinafter called "the respondent") appealed against an assessment for purposes of sur-tax in the sum of 31,239*l.* for the year ending April 5, 1935, made upon him under the provisions of the Income Tax Acts.

The assessment included a sum 17,073*l.*, being the gross equivalent of a sum of 13,600*l.* 13*s.* 9*d.* placed to the credit of Mrs. D. G. Corbett (the respondent's wife) by the executors of the will of her late father, Sir Richard Garton. Mrs. D. G. Corbett was entitled to a life interest in a part of the residuary estate of the said Sir Richard Garton, who died on April 22, 1934.

Under the will of the testator, dated March 1, 1933, after the bequest of certain pecuniary and specific legacies, the testator devised and bequeathed all his real and personal property, except otherwise disposed of, unto his executors and trustees to convert the same into money and out of the moneys to arise from such conversion to pay funeral, testamentary expenses, debts, etc. Under clause 11 of the will the trustees were to invest the residue of the moneys (thereinafter called "the trust fund") in their names. Clause 12 of the will was as follows: "My trustees shall stand possessed of the "trust fund upon trust to divide the same into five equal "shares. (*a*) My trustees shall hold three of such shares "(hereinafter called 'Dorothy's share') upon trust to pay "the income thereof to my said daughter Dorothy during "her life without power of anticipation and after her death "shall hold Dorothy's share and the future income thereof" in trust for her children as therein provided.

The testator's daughter Dorothy was the wife of the respondent.

The testator's estate amounted to approximately 2,750,000*l.* The residuary account was made up as at May 7, 1935. Evidence was given at the hearing, which the Commissioners accepted, that it could not have been made up to an earlier date.

During the period of the administration of the testator's estate by his executors the following accounts were kept by them :—

(1.) Residuary account as at May, 1935, after giving effect to adjustments as subsequently agreed with the Estate Duty Office.

(2.) Revenue account which formed a schedule to the said residuary account.

(3.) Balance sheet and income account as at April 5, 1935, wherein appeared the sum of 13,600*l.* 13*s.* 9*d.* placed to the credit of Mrs. D. G. Corbett (the respondent's wife). This sum with appropriate addition of income tax thereto amounted to the said sum of 17,073*l.* included in the assessment under appeal.

It was contended on behalf of the respondent :—

(i.) That the residue of the estate of the testator was not ascertained before May 7, 1935;

(ii.) That prior to the ascertainment of the said residue no income within the meaning of the Income Tax Acts arose or accrued to the wife of the respondent from the estate of the testator;

(iii.) That no part of the said sum of 13,600*l.* 13*s.* 9*d.* was received by the wife of the appellant as income; and accordingly

(iv.) That the assessment to sur-tax made upon the respondent for the year 1934–35 was excessive by the said amount of 17,073*l.*

It was contended on behalf of the Crown (*a*) that the respondent's wife had received at least the 17,073*l.* above referred to, (*b*) that the tenant for life, the respondent's wife,

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could only receive income, (*c*) that any sum received by the respondent's wife or credited to her formed part of the respondent's income for sur-tax purposes.

The Commissioners gave their decision as follows: "We "find on the evidence that the residue of the estate was "ascertained on May 7, 1935.

"We hold that the [respondent's] wife, being tenant for "life of a share of the residue of the estate, was entitled to "the income arising or accruing from that share as from the "date of the death of the testator. That such income was "rightly included in the computation of the total income "of the [respondent] for the purposes of sur-tax and that "the appeal failed.

"The figures having been agreed we reduced the assessment "to 26,305*l.*"

Lawrence J. held that Mrs. Corbett was not entitled to anything until the residue was ascertained and that the sum which she then received representing the share of the income which had accrued during the period of administration was not received as such income but a sum equal to the income. The amount was, therefore, wrongly included in the computation of sur-tax.

The Crown appealed. The appeal was heard on December 9, 10 and 13, 1937. On the appeal the Crown limited their claim to a sum of 6000*l.*, which was actually paid to Mrs. Corbett at some time before April 5, 1935.

Sir Terence O'Connor S.-G., *J. H. Stamp* and *R. P. Hills* for the Crown.

A. M. Latter K.C., *R. H. Hodge* and *F. Heyworth Talbot* for the respondent.

The arguments fully appear from the judgments of the Court of Appeal.

SIR WILFRID GREENE M.R. Sir Richard Garton died on April 22, 1934, having made a will dated March 1, 1933, whereby, after the bequest of certain pecuniary and specific legacies, he devised and bequeathed all his real and personal property, except property otherwise disposed of, to his executors and trustees upon trust to convert the same into money and out of the proceeds to pay his funeral and testamentary expenses and debts in the usual way. Under clause 11 of the will the trustees were to invest the residue, which was in the will called the trust fund. By clause 12 they were to stand possessed of the trust fund upon trust to divide it into five equal shares, of which three were to be held upon trust for his daughter Dorothy, upon trust to pay the income to her for life, and after her death in trust for her children.

The testator was a very wealthy man. His daughter Dorothy, who was entitled to three-fifths of the residue for life, was Mrs. Corbett, the wife of the present respondent. The residuary account of the testator's estate was made up as at May 7, 1935, and that is the date as on which it is to be taken that the residue was finally ascertained. In the accounts prepared by the executors, items appeared showing a credit to Mrs. Corbett and to Mrs. Barlow, who, under the will, was entitled, I think, to the other two-fifth shares. In the case of Mrs. Corbett the credit was 13,600*l.* That account, in which that entry appears, was an account made out by the executors, not for the purpose of death duties but for the purpose of showing the position of the estate as regards the beneficiaries. The credits were arrived at by applying the well-known rule in *Allhusen* v. *Whittell* (1), with regard to which I shall have more to say later.

The present respondent was assessed to sur-tax for the year ending April 5, 1935, in a sum of 31,239*l.*, which included 17,073*l.* This latter sum was the 13,600*l.* to which I have referred, which had been placed to his wife's credit by the executors, with an addition for income tax; in other words, the amount placed to her credit was grossed up for the purpose of ascertaining the proper sum to bring into the computation for sur-tax purposes. The appellant appealed against that assessment and contended that the sum of 13,600*l.* ought not to have been brought into the assessment

(1) L. R. 4 Eq. 295.

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at all. That contention was rejected by the Special Commissioners, but when the matter came before Lawrence J. on appeal from their decision, he allowed the appeal, holding that the case was governed by the case of *Dr. Barnardo's Homes* v. *Special Income Tax Commissioners.* (1)

Before the Special Commissioners and before Lawrence J. the contention of the Crown was that the whole of the 13,600*l.* ought to be brought into assessment and grossed up. Before this Court the Crown does not say that, but it limits its claim to a sum of 6000*l.* which was actually paid to Mrs. Corbett at some time before April 5, 1935. That payment appears in the account to which I have referred under the heading " Payments on account, 6000*l.*"

As I have said, no distinction was drawn in the argument before the Special Commissioners or Lawrence J. between that 6000*l.* and the remainder of the 13,600*l.*, which had only been credited to Mrs. Corbett and not paid over to her. The learned Solicitor-General, in opening the case, attached some special importance to the fact of payment of that 6000*l.* He described it as an assent by the executors to the gift to Mrs. Corbett, and on that basis he claimed that it was, so to speak, by anticipation bringing into effect the trusts of the will relating to the income of the residuary estate. With regard to the balance, if and when it came to be paid, he did not say that that balance would necessarily be brought into account for sur-tax purposes, because he thought or appeared to think that that might possibly fall into a different category. I am unable to attach to the fact of payment the particular importance which the Solicitor-General invited us to attach to it, because if the argument was that this was in some sense an assent by executors, that would be a matter upon which the Special Commissioners ought to have found the facts. No such point was taken before them, no such fact was found, and I cannot regard that payment, as described in the accounts in the way I have mentioned as anything else than a payment on account of the amount which Mrs. Corbett would be found to be entitled to when the ultimate adjustment came to be made upon the close of the administration and the ascertainment of the residue. It seems to me that that is all it is and that it has no special quality beyond that.

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(1) [1921] 2 A. C. 1.

Mr. Stamp, on behalf of the Crown, put the argument in a different way. He did not appear to attach that special importance to the fact of payment which the learned Solicitor-General attached to it. The way he put the case was this, that every payment to Mrs. Corbett, whether it was made pending the administration or whether it was made at the conclusion of the administration, when the *Allhusen* v. *Whittell* (1) adjustment was finally made, was of necessity an income payment, and as such formed part of Mrs. Corbett's income and was part of her income and, in consequence, of her husband's income for sur-tax purposes. He accepted the position, and I think was bound to accept it, that no difference could be drawn between a payment on account pending administration and the final payment, when it comes to be made, of the amount due to Mrs. Corbett on the *Allhusen* v. *Whittell* (1) principle. In other words, the only reason why the 7600*l.* which had not been paid does not come into her sur-tax assessment or her husband's sur-tax assessment for the year in question was the fact that it had not yet then been paid and that when it came to be paid it would be in exactly the same position as the 6000*l.*, although in a different year.

Lawrence J. held, as I have said, that the case was covered by the *Barnardo* case (2) and that no distinction was to be drawn between the case where the residue is settled and the case where the residue is given absolutely, so far as regards the application of the principles laid down in that case.

It is said on behalf of the Crown that, while accepting the principle of the *Barnardo* case (2), it does not in any case apply to a case where there is a tenancy for life of the residue, for the reason that what the tenant for life receives must be income and can be nothing else. The question, to my mind,

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(1) L. R. 4 Eq. 295.

(2) [1921] 2 A. C. 1.

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depends on the true meaning and effect of the *Barnardo* decision. (1) That decision, in point of fact, has been applied by Rowlatt J. in the case of the *Marie Celeste Samaritan Society of the London Hospital* v. *Commissioners of Inland Revenue* (2) in a way inconsistent with the Crown's present contention, and it follows that, if the Crown is right upon this appeal, the decision in the *Marie Celeste* case (2) was wrong, a circumstance which may no doubt give comfort to the Inland Revenue, having regard to the fact that in that case it obtained a decision after putting forward an argument precisely the reverse of the argument which it has put forward in this case.

The *Barnardo* case (1) was a case in which a charity was endeavouring to obtain repayment of tax under the sections in the Income Tax Act, 1842, giving exemption to charities. It is perfectly correct to point out that in that case the charity was claiming return of tax deducted from specific dividends received by the executors. What had happened was this, that the charity was absolutely entitled to the residuary estate under the will; there was delay owing to litigation in which the next of kin contested the will and at the conclusion of the administration the executors handed over a sum to the charity. The charity claimed that, with reference to such part of that sum as could be referred to income, tax had been suffered in respect of it when it was paid to the executors, and that they claimed to recover. The particular language relating to the exemption of charities which was then in force was to be found in para. 3 of Sch. C to s. 88 of the Income Tax Act, 1842, which provided that there should be exemption from tax in respect of "The stock "or dividends of any corporation, fraternity, or society of "persons, or of any trust established for charitable purposes "only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, "or will, shall be applicable by the said corporation, fraternity, "or society, or by any trustee, to charitable purposes only, "and in so far as the same shall be applied to charitable

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(1) [1921] 2 A. C. 1.

(2) 11 Tax Cas. 226.

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"purposes only." In s. 105 was a further exemption extending to yearly interest or annual payment chargeable under Sch. D, in so far as such interest or payment was applied to charitable purposes only.

The contention of the charity was negatived by the House of Lords. The one and only contest in this case to my mind is: What was the real basis of the decision in that case? I cannot read the opinions in that case as having such a limited application as the Crown in this appeal would have us hold. It appears to me that the case lays down a general proposition applicable to all cases of residue which is being ascertained and which cannot be ascertained until the administration is complete. We have an authoritative statement as to the effect of that case in the speech of Lord Buckmaster in a subsequent case, namely, the case of the *Commissioners of Inland Revenue* v. *Wahl.* (1) I propose to read that passage before I come to examine the decision in *Barnardo's* case (2), because it puts in a nutshell what in my opinion, if I may respectfully say so, is the effect of the *Barnardo* decision. (2) "Since the case of *Barnardo* v. "*Commissioners of Inland Revenue,*" (2) says Lord Buckmaster, "it has been clearly established that the accumulation of "income arising from a residuary estate before the appropria-"tion of that estate to the residuary legatees does not cause "such income to be regarded as the income of the beneficiary "on its ultimate receipt by him and, therefore, where, as in "that case, the beneficiary was a charitable institution, they "are not entitled to a return of the sums which have been "deducted by way of tax from the income at its source. In "that decision, in the Court of Appeal, Lord Justice Atkin "pointed out that the result would be that, in similar circum-"stances, super-tax could not be charged." It is quite obvious from that observation that in the view at any rate of Lord Buckmaster the principle underlying the *Barnardo* case (2) was not a limited principle turning entirely on the precise language of the provisions of the Income Tax Act relating to the exemption of charities. He read it, as I read

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(1) (1931-33) 17 Tax Cas. 744, 759.

(2) [1921] 2 A. C. 1.

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it, as deciding the case of the charity concerned upon the larger principle that, until the residue is ascertained in the due course of administration, the beneficiaries have no title to that residue. From that major proposition the minor proposition followed, that the charity could therefore have no right to these dividends in respect of which it was claiming repayment of tax.

That that was the view of the House of Lords, or must be taken to be the view of the House of Lords, quite apart from what Lord Buckmaster said, appears, I think, from a consideration of a passage in the speech of Lord Finlay and a passage in the speech of Lord Atkinson. I will deal in a moment with what was said by the fourth Member of the House, Lord Cave. There were four noble and learned Lords sitting.

Lord Finlay says this (1): "It appears to me that the "present case is really decided by the decision of this House "in *Lord Sudeley's* case. (2) It was pointed out in that "case that the legatee of a share in a residue has no interest "in any of the property of the testator until the residue "has been ascertained. His right is to have the estate properly "administered and applied for his benefit when the adminis-"tration is complete. The income from which this income "tax was deducted was not the income of the charity. It "was the income of the executors. They were, of course, "bound to apply it in due course of administration but they "were not trustees of any part of it for the charity. There "had been no creation of a trust in favour of the charity in "respect of this income, it was never paid over to the charity "as income. What was ultimately paid over on the close "of the administration was the share of the whole estate, "consisting of capital and accumulated income, which fell "to the charity. The executors, not the charity, were the "recipients of this income, and there is no relation back in "the case of the bequest of a residue. If no right of deduction "at the source had existed it is the executors and the

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(1) [1921] 2 A. C. 1, 8; 7 Tax Cas. 646, 668.

(2) [1897] A. C. 11.

"executors only who could have been made liable for the "tax."

Pausing there for a moment, the language of Lord Finlay is, in my opinion, just as applicable to the case where the residue is settled as to the case where the residue is not settled. In neither case are the executors trustees; in neither case is the income the income of anybody but the executors; in each case the executors and not the beneficiaries are the recipients of the income, and there is no relation back; in each case, if no right of deduction at the source had existed, it is the executors and the executors only who could have been made liable for the tax. I myself attach great importance to the distinction drawn between the position and estate of executors and the position and estate of trustees, for this reason, that where trustees are in receipt of income which it is their duty to pay over to beneficiaries, either with or without deduction of something for trustees' expenses on the way, that income is at its very inception the beneficiaries' income. It is perfectly true that for assessment purposes the trustees may fall to be assessed, but the income is the beneficiaries' income from the very first and the expenses so paid out of it are paid out of it, so to speak, on the way. But, in the case of executors, it is not true to say (and this is how I read the opinion of Lord Finlay) that the income when received by executors pending the conclusion of the administration is the income of the beneficiaries in that sense.

Lord Atkinson said this (1): "The case of *Sudeley* v. "*Attorney-General* (2) decided in this House conclusively "established that, until the claims against the testator's estate "for debts, legacies, testamentary expenses, etc., have been "satisfied, the residue does not come into actual existence. "It is a non-existent thing until that event has occurred. "The probability that there will be a residue is not enough. "It must be actually ascertained. And if this be so, then "it cannot be held that until the residue has been ascertained "any residuary legatee is entitled thereto within the meaning

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(1) [1921] 2 A. C. 1, 11; 7 Tax Cas. 669.

(2) [1897] A. C. 11.

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"of s. 88, Sch. C, of the Income Tax Act, 1842, or that the "payment of Income Tax on any portion of the income of "the testator is a payment made on behalf of the residuary "legatee. Rule 3 of Sch. C does not apply, because what is "applicable to the charity is the residue when ascertained." Then he goes on to say: "The principle applied by a Court "of equity to a case between a tenant for life and a remainder-"man of a residue, to prevent the entire income of that fund "being, during the life of the tenant for life, taken towards "discharging the claims on the testator's estate has no "application to the present case." That, of course, is a reference to the rule in *Allhusen* v. *Whittell* (1), to which Lord Cave in his speech refers more fully.

Lord Cave does, it is true, attach more importance to the precise language of the exemption clauses, because he says (2): "On reading the above provisions it is clear that exemption "is given only in respect of any dividends, interest or other "annual payments 'of'—that is to say, belonging to—a "charity, or which according to its trust instruments are "applicable to charitable purposes only, and only in so far "as they are in fact applied to charitable purposes. The "appellants must therefore, in order to succeed in their claim, "prove that the dividends from which tax was deducted "were dividends (*a*) belonging to the appellants, or (*b*) applicable "to their charitable purposes only, and (*c*) in fact so applied. "Plainly this cannot be said of these dividends when received. "When the personal estate of a testator has been fully "administered by his executors and the net residue ascertained, "the residuary legatee is entitled to have the residue as so "ascertained, with any accrued income, transferred and "paid to him; but until that time he has no property in any "specific investment forming part of the estate or in the "income from any such investment, and both corpus and "income are the property of the executors and are applicable "by them as a mixed fund for the purposes of administration." That concluding paragraph is, it seems to me, of general application, and is equally true whether you are dealing

(1) L. R. 4 Eq. 295.

(2) [1921] 2 A. C. 1, 9; 7 Tax Cas. 668.

with a residue given absolutely or a residue settled on tenant for life with a remainder over.

Lord Cave then goes on to deal with *Allhusen* v. *Whittell* (1), and after stating what the effect of that case is he says, with regard to the argument which had been based upon it on behalf of the charity: "In my opinion this argument is "misconceived. The rule in *Allhusen* v. *Whittell* (1) is "confined to cases where a residuary fund is held in trust "for several persons in succession, and where for the purposes "of ascertaining the rights of the beneficiaries inter se, it is "necessary to disentangle the accounts and to determine "what part of the total fund should be treated as income "and paid to the life tenant. In this case there is no trust "and no life tenant; and there is no authority whatever "for applying the rule in question to a case where the residuary "legatee is absolutely entitled to the residue." I cannot read that reference to *Allhusen* v. *Whittell* (1) as by implication saying that in a case where the residue is settled, the *Allhusen* v. *Whittell* (1) principle should be applied for the purpose of stamping with the character of "income-tax income" the sum paid under that rule to the tenant for life.

It must not be forgotten that although, as between tenant for life and remainderman, in applying equitable principles, a certain sum is to be treated as income and another sum is to be treated as capital, it does not necessarily follow from that proposition that the sum which equity says is to be treated as income for that purpose and as between those parties, is income as between the recipient and the Revenue. The *Allhusen* v. *Whittell* (1) rule really exists to save the tenant for life from being prejudiced by the particular nature of the executor's interest and the particular status of the estate during administration. When the residue is not settled, but is given absolutely, the residuary legatee receives, on the conclusion of the administration, a sum of money. There is no necessity in that case for equity to insist upon any splitting up, any dissection, of that sum of money, because the entirety belongs to the residuary legatee. Nevertheless,

(1) L. R. 4 Eq. 295.

that sum of money, if its origin is to be traced, represents in part income and in part capital. There can be no question of that. On the other hand, when the residue is settled, it does become necessary to dissect the sum which remains in the executor's hands at the conclusion of the administration, because, if that were not done, the tenant for life would be prejudiced by the fact of administration, and the longer it took, the more he would be prejudiced. Equity then steps in, and says: "As between the tenant for life and the "remainderman, we are going to impress, for our own purposes, "a particular character on this fund. We are going to treat "it, as between you two parties, as divisible in part to the "tenant for life, and in part to the remainderman," and the principle on which it is divided is a principle which in effect throws upon the tenant for life the burden of the administration, to this extent, that capital is treated as liable to contribute such a sum of capital as, with the income thereon for the relative period, would provide for the necessary expenses. The effect of that adjustment is that the tenant for life, when he receives that sum, is receiving a sum equal to the income of the estate, less the income which that part of capital notionally applied would have produced. These calculations do not represent anything that has happened in truth and in fact, but are purely notional calculations for the purpose of applying the rule of equity. It is perfectly true, as I have said, that the sum, which the tenant for life receives on that apportionment as between him and the remainderman, he receives as income, but that is quite a different proposition from saying that the sum which he receives is his income for the purposes of the Income Tax Acts. The language of Lord Cave is, as usual, very carefully chosen, because in stating the rule, he says (1): "it is necessary to disentangle "the accounts and to determine what part of the total fund "should be treated as income and paid to the life tenant." Just above he says: "the tenant for life is entitled as from "the death of the testator to a sum equal to the income of "the residue of the estate after deducting such portion of

(1) [1921] 2 A. C. 1, 10; 7 Tax Cas. 669.

"the capital as, together with the income of such portion "for one year, was required to pay the testator's debts and "legacies." Then he points out again that there is no trust and no life tenant.

In my opinion, the existence of the rule in *Allhusen* v. *Whittell* (1) cannot alter the fundamental fact that, during the period of administration, the income is the executor's income and nobody else's. As Lord Atkinson said, and as had been pointed out by Lord Sterndale and Atkin L.J. (as he then was) in the Court of Appeal, the residue does not exist until the estate is cleared. The tenant for life, accordingly, was not entitled to any income of that non-existent thing. Mr. Stamp referred to a number of examples, and a number of cases were referred to both by the learned Solicitor-General and by Mr. Stamp. I do not propose to go into those, because they do not appear to me really to assist the argument. Cases and examples dealing with the rights of beneficiaries under trusts seem to me to stand in a different category altogether from that in which a residuary legatee stands vis-à-vis executors. The fundamental difference of the two cases was recognized by the House of Lords in the *Barnardo* case (2), and I do not myself find any assistance from considering cases of trusts. Mr. Stamp submitted that what the tenant for life here received was in exactly the same position as a sum of income paid to a beneficiary under a trust out of a fund which had borne tax before it reached the hands of the trustees. I am unable to accept that argument. It seems to me that in such a case the income, when it came into the hands of the trustees, was the income of the beneficiary, and the tax which it bore was the beneficiary's tax. True that the trustees' hand was the hand to receive it. True that the trustees, after receiving it, might have to pay expenses out of it, with the result that the tenant for life only received a net sum. Nevertheless, the right and interest of the beneficiary in the dividends so received by the trustees under a trust of that kind appear to me to differ in every fundamental respect from the right

(1) L. R. 4 Eq. 295. (2) [1921] 2 A. C. 1.

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and interest of a residuary legatee in dividends received by executors during the period of administration. That is the difference on which the *Barnardo* case (1) is really based.

The matter can be looked at from rather a different angle, but I think with the same result. A taxpayer is liable to pay sur-tax in respect of his income, and when he makes his return of total income for the purpose of sur-tax, he brings in the whole of his income ; and where the income is income which has borne tax at the source, he brings in the gross amount. That is on the basis that the income, when received, and when struck with tax by deduction, was his income ; and that, notwithstanding the circumstance that the hand of trustees might be interposed between his hand and that of the payer. But in the present case it is quite impossible to say that, because the income when received by the executors was not the beneficiary's income ; it was the executors' income. That was pointed out as clearly as anything could be pointed out in the *Barnardo* case. (1) It is, of course, impossible for the Crown to suggest that the 6000*l.* that was paid here was a different income from the income received by the executors. They do not claim that the recipient of that 6000*l.* was directly assessable in respect of it, nor do they suggest that, on paying that 6000*l.*, the executors ought to have deducted tax. In other words, they do not treat that 6000*l.* as being a new income springing up when it was paid, but they link it with the income received by the executors upon the allegation that the income, when received by the executors, was the income of the beneficiary for tax purposes. It seems to me that there is an unbridgable gap which makes it impossible to link that 6000*l.* to the dividends received by the executors, because it is impossible to trace back the title of the beneficiary to that 6000*l.* into the income which the executors received, because that income was the executors' income and nobody else's.

The only other matter to which I wish to refer is the *Marie Celeste* case (2), because if that case was rightly decided, it is the same as the present case. In my opinion,

(1) [1921] 2 A. C. 1.

(2) 11 Tax Cas. 226.

the *Marie Celeste* case (1) was rightly decided, and for correct reasons. It was a case where there was a gift to a charity upon trust. I think it is clearer if I just refer to the terms of the will. In the will, after making certain bequests, the testator devised and bequeathed the residue of his estate to his trustees upon trust to sell and convert the same into money, and out of the produce to pay legacies and debts, to set apart a sum to answer an annuity to his wife, and to stand possessed of the residue upon trust for the Governors of the London Hospital, Whitechapel Road, to be held by them upon trust for investment, and to stand possessed of the investments upon trust to pay the income for the purposes of the Marie Celeste Samaritan Society. Then the trustees were given various powers. The estate was administered, and during the period of administration the executors received large amounts of income, and had a substantial surplus on income account. Pending the completion of the administration, they handed over to the charity certain specific sums. In respect of those sums (not in respect of any specific dividends, but in respect of those sums so paid over) the charity claimed to recover the appropriate tax. It was contended on behalf of the Crown in that case: "(1.) That the residue of the estate was not ascertained "earlier than 31st August, 1919; (2.) that until the residue "of the estate had been ascertained, the income was the "income of the executors and not that of the appellants or "the Governors." That is precisely the argument which the Crown in this case contests.

Rowlatt J. said (2): "In my opinion this appeal fails "upon a point which may be a narrow one but which I think "is sufficient. That point is that the income of the assets "of this estate—being, I will assume, assets producing income "within the category named in sub-s. 1 (*b*) of s. 37 of the "Income Tax Act"—that is the section that now takes the place of one of the provisions considered in the *Barnardo* case (3)—" that income, at the time it was received, at the

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(1) 11 Tax Cas. 226.
(2) Ibid. 231.
(3) [1921] 2 A. C. 1.

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"time when tax was deducted, and in the form (meaning "the form named in that category) in which it was received, "was the income only of the executors, and that the money "paid to the charity—the 4000*l.* or 5000*l.* odd paid to the "charity—said to be income, was, if income, not such income "as is described in that category, but was (to use the precise "language of Lord Cave in the *Dr. Barnardo's Homes* case (1)) "'a sum equal to the income' which was payable to the "charity as a matter of 'equitable bookkeeping' (to use the "expression used in the argument in the Court of Appeal) in "due course of administration. Such system of equitable "bookkeeping arises when there are successive interests in a "residue, as in the case of *Allhusen* v. *Whittell* (2). That is "enough to dispose of this case."

In my opinion, as I have said, that decision was correct, and that decision cannot be treated as having been given on any narrow point such as Mr. Stamp suggested was the ground of the decision of the *Barnardo* case (1), based upon the necessity of pointing to some specific dividend of some specific security.

In my opinion, the appeal fails, and must be dismissed with costs.

Romer L.J. If I did not regard myself as precluded from doing so by authority, I should myself have decided this case in favour of the appellants, for I should have thought that when the rule in *Allhusen* v. *Whittell* (2) is applied as between tenant for life and remainderman of a residuary estate, and a sum is, in accordance with that rule, ascertained as being the sum properly payable to the tenant for life the sum so paid to him would be his income and income which had already been brought into tax. After all, the rule in *Allhusen* v. *Whittell* (2), as subsequently explained by Sargant L.J. in *In re McEuen* (3) and *In re Wills* (4), is no more than this, that for the purpose of adjusting rights as between the tenant for life and the remainderman of a

(1) [1921] 2 A. C. 1.
(2) L. R. 4 Eq. 295.
(3) [1913] 2 Ch. 704.
(4) [1915] 1 Ch. 769.

residuary estate, debts, legacies, estate duties, probate duties and so forth are to be deemed to have been paid out of such capital of the testator's estate as will be sufficient for that purpose, when to that capital is added interest on that capital from the date of the testator's death to the date of the payment of the legacy or debt, or whatever it may have been, interest being calculated at the average rate of interest earned by the testator's estate during the relevant period. When once the capital of the residuary estate has been ascertained in the way that I have mentioned, that capital is capital of the residuary estate without any question. It is the capital to which the persons interested in the capital of the residuary estate are entitled. In the same way, I should have thought that when from the total income received by the executors there has been deducted the amount of income, ascertained in the way I have mentioned, required for the purposes of paying the debts and so forth, the balance of what has been received by the executors represents that part of the residuary estate to which the tenant for life is then and there entitled, namely, the income up to that time of the residuary estate as finally determined. Speaking for myself, again in the absence of authority, I should have thought that the same rule would apply whenever and wherever it becomes necessary for any purpose whatsoever to ascertain what, when the residue is finally ascertained, represents income and what represents corpus. In other words, where the residue is given absolutely to a charity, I should have thought the charity was entitled to have it ascertained, in accordance with the rule of *Allhusen* v. *Whittell* (1), what sum represents income of the residue handed over to the charity, for the purpose of enabling the charity to claim a return from the Crown of the income tax that can be found to have been paid in respect of that sum. So, too, I should have thought in the case of a bequest of residue to an individual, the Crown would be entitled to have it ascertained, in accordance with the rule of *Allhusen* v. *Whittell* (1), how much of what was handed over by the executors to the residuary legatee could be properly said to represent income. But I think I am prevented from holding these views, by reason of the decision of the House of Lords in the *Barnardo* case. (1) The *Barnardo* case (1) was a somewhat unusual one. It was a case of a very simple administration in one respect, that is to say, the debts were all paid, and the estate could have been cleared within a very short time after probate had been granted. It is so stated, I think, by Lord Finlay in the House of Lords. The distribution of the estate, and therefore the ultimate ascertainment of the residue, was held up not by difficulties of administration, but by the fact that the next of kin, the whole of the residue having been bequeathed in favour of the charity, disputed the will, so that the ultimate residue was not finally ascertained until the action was compromised, as it was eventually compromised, on terms which entitled the charity to receive two-thirds of the net residue and the next of kin to receive the other third. The two-thirds of the residue, as ultimately ascertained, having been handed over to the charity, the charity discovered that there had been deducted at source from the income received by the executors, in the meantime, certain sums for income tax. Having regard to what I have said about the estate being cleared at a comparatively early time, it seems more than probable that amongst the assets handed over to the charity, as representing the residue, were the identical securities that had borne the tax which the charity was seeking to recover, and that being so, for the purpose of formulating their claim, the charity would no doubt claim the exact sum of tax that had been deducted from the income of those specific securities, because such securities would not have been utilised for payment of debts or expenses of adminstration and would not have been affected by the application of the rule in *Allhusen* v. *Whittell*. (2) Although that was, as I understand it, the actual claim of the charity, that is to say, to be repaid the income tax that had been paid in respect of certain specific securities, the case was not argued on the footing that the

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(1) L. R. 4 Eq. 295.

(1) [1921] 2 A. C. 1.

(2) L. R. 4 Eq. 295.

charity were entitled at any time to the income of those specific securities before distribution. It appears to have been argued on the broad footing that the charity were entitled to receive as income what, applying the doctrine in *Allhusen* v. *Whittell* (1), should be found to be the sum, the part of residue, attributable to income. That plainly appears, I think, if one looks at the argument of Mr. Clauson (as he then was) on behalf of the appellants, the charity, in the House of Lords. After referring to s. 88 of Sch. C as extended by s. 105, those being the sections under which the charity claimed that they were entitled to exemption from tax, he said this (2): "If then the Legislature has exempted "the appellants' income the question to be determined is "what is in substance and in fact the income to which the "appellants are entitled. The Court of Appeal have proceeded "on the basis that until the residue is ascertained it cannot "be said that the residuary legatees are entitled to anything" —then a little later—" The appellants had a present right to "the residue when ascertained. Subject to adjustment, they "were entitled to the residue from the death of the testator, "and the income which that residue earned, although the "exact amount could not be ascertained till later." That is, if I may so call it, an *Allhusen* v. *Whittell* (1) argument throughout; and the argument on behalf of the Crown, amongst other things, pointed out this (3): " It is not put "by the appellants that these dividends were the property "of the charity, but their case is put on some sort of equitable "accounting applicable to an estate settled on tenant for life "and remaindermen on the analogy of *Allhusen* v. *Whittell* (1)," so that the case was presented to the House of Lords as an *Allhusen* v. *Whittell* case (1). Lord Cave was the only member of the House who referred in terms to *Allhusen* v. *Whittell* (1), and he said that the *Allhusen* v. *Whittell* (1) rule did not apply in such a case, that is to say, it did not apply to a charity which was anxious to discover what part of the residue handed over to it represented income. But the other two

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(1) L. R. 4 Eq. 295.
(2) [1921] 2 A. C. 1, 3.
(3) [1921] 2 A. C. 4.

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members of the Court who delivered judgments, namely, Lord Finlay and Lord Atkinson, must, I think, be taken to have been deciding that even if the rule in *Allhusen* v. *Whittell* (1) did apply to the charity, nevertheless the sum ascertained in accordance with that rule as being the sum that would have been paid over to a tenant for life in a case of tenant for life and remainderman would not be income of a charity which had been taxed. That, I think, would account for the very general terms of the language which both Lord Finlay and Lord Atkinson used. Lord Finlay said this (2): "There had been no creation of a trust in favour "of the charity in respect of this income, it was never paid "over to the charity as income"—of course, he is dealing there, no doubt, with the specific sums. Then he says: "What was ultimately paid over on the close of the adminis-"tration was the share of the whole estate, consisting of "capital and accumulated income, which fell to the charity." That is precisely true of a tenant for life and a remainderman. What is handed over is the fund, consisting of capital and accumulated income, accumulated income being handed over to the tenant for life, and the capital being kept in trust for the person entitled to the corpus of the residuary estate. Then Lord Finlay, after referring to that income (the accumulated income), says: "The executors, not the charity, "were the recipients of this income."

Lord Atkinson, in still plainer terms, says this (3): "that "until the claims against the testator's estate for debts, "legacies, testamentary expenses, etc., have been satisfied, "the residue does not come into actual existence. It is a "non-existent thing until that event has occurred." If it is a non-existent thing, until that event has occurred, it cannot possibly be earning income in the meantime. A non-existent thing cannot possibly earn income.

Language to much the same effect was used, I notice, in the Court of Appeal in the same case. There I see that Lord Sterndale said this (4): "The executors as "soon

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(1) L. R. 4 Ex. 295.
(2) [1921] 2 A. C. 1, 8.
(3) Ibid. 11.
(4) [1920] 1 K. B. 468, 479.

"as the residue was ascertained became trustees for the "residuary legatees of that fund, but until that was ascertained there was no fund of which they could become, or "did become, trustees for the residuary legatees." Atkin L.J. (as he then was) contrasting the case of a person entitled to a pecuniary legacy with that of a person entitled to the residuary estate, said this (1): "It is not merely that "the amount of the legacy is not ascertained" (that means the residue) "but that the legacy is not even in existence in "the form in which it is bequeathed to the legatee. It appears "to me that there is no authority for the proposition that the "title of a residuary legatee relates back to the death as soon "as the executor has ascertained the amount and has "intimated to the legatee what that amount is." Applying that as I have no doubt Atkin L.J. intended it to be applied, namely, to the case of a tenant for life and a remainderman, when, by the application of the rule of *Allhusen* v. *Whittell* (2), you have discovered the sum that ought to be handed over by the executors to the tenant for life, it cannot be said by the tenant for life or against the tenant for life that his title to that sum relates back to the death of the testator, so that it can be said that that sum represents income accruing from the death of the testator until the time when it is handed over.

For these reasons, notwithstanding the opinion that I should have formed but for the decision of the House of Lords in *Barnardo's* case (3), I feel that I am precluded by that decision from giving effect to that opinion. I agree accordingly that this appeal fails, and must be dismissed.

MACKINNON L.J. I agree. I think that the Commissioners of Inland Revenue in this case are hoist with the two petards of their own previous making, the *Barnardo* case (3) and the *Marie Celeste* case. (4) The *Marie Celeste* case (4) is absolutely indistinguishable from this case. In that case, there was 5000*l.* at stake, and in this case there is

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(1) [1920] 1 K. B. 468, 482.
(2) L. R. 4 Eq. 295.
(3) [1921] 2 A. C. 1.
(4) 11 Tax Cas. 226.

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6000*l.* Except for irrelevant considerations of consistency and possibly of decency, there is, of course, nothing to prevent the appellants arguing, as they did here, that the *Marie Celeste* case (1) was wrongly decided by Rowlatt J. I think it was not. I think he decided the case rightly, in that he was only applying the principle that bound him, as it binds us, enunciated by the House of Lords in the *Barnardo* case. (2)

Appeal dismissed.
Leave to appeal to House of Lords granted on the terms that the Crown would pay the respondent's costs in any event.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Tamplin, Joseph, Ponsonby, Ryde & Flux.*

W. I. C.

(1) 11 Tax Cas. 226.

(2) [1921] 2 A. C. 1.

BENNETT (H.M. INSPECTOR OF TAXES) *v.* MARSHALL.

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Dec. 13, 14, 15.

Revenue—Income Tax—Employment—Employers outside United Kingdom—Contract of employment and payment of salary outside the United Kingdom—Work of employee not done wholly outside the United Kingdom—"Income arising from possessions out of the "United Kingdom"—Method of assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case II., Case V.—Finance Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 18.

M. was employed during the financial years 1933–35 as vice-president in charge of overseas sales of an American company. He resided in England and his duties under his employment, the terms of which were not contained in any written agreement, were to supervise the sales of the products of the American company in all countries except U.S.A. and Canada, whether sold direct by them or through agents or subsidiary companies. His place of employment was at the office of the American company in Ohio and he was paid from that place, and at his request payment was made to his credit in a banking account in Canada. Part of his work was done in England :—

Held, that as the agreement for employment under which his salary was payable and the actual payment were made outside the United Kingdom, M. was only assessable in respect of the income arising from his employment under Case V. as being "income arising from possessions out of the United Kingdom" and therefore by virtue of r. 2 of the Rules applicable to Case V. his assessment must be on so much only of that income as was remitted to this country.

Colquhoun v. *Brooks* (1889) 14 App. Cas. 493 and *Foulsham* v. *Pickles* [1925] A. C. 458 discussed and applied.

APPEAL from the decision of Lawrence J. on a Case stated under the Income Tax Act, 1918, by the Commissioners for the General Purposes of the Income Tax for the Division of St. Giles-in-the-Fields and St. George's, Bloomsbury.

The special Case was substantially in these terms :—

At a meeting of the General Commissioners held on November 27, 1935, Mr. G. A. Marshall (hereinafter called "the respondent") appealed against assessments made upon him under Sch. E of 4000*l.* for the year 1933–34 and 6000*l.* for the year 1934–35 in respect of his remuneration as vice-president in charge of overseas sales for the National Cash Register Company, of Dayton, Ohio (hereinafter called "the American company") incorporated in the United States of America.

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It was stated on behalf of the respondent that the question of figures did not arise and that the case could be referred back for these to be agreed if the respondent were found to be liable.

The following facts were admitted or proved :—

(*a*) The respondent was resident in the United Kingdom for the year 1933–34.

(*b*) The National Cash Register Company, Ld., incorporated under the Companies Acts in the United Kingdom (hereinafter called "the English company"), was at all material times a subsidiary company of the American company.

(*c*) The respondent was born in Canada and was domiciled there. After being employed by a subsidiary company of the American company at Toronto in Canada and subsequently in Cuba the respondent was employed by the English company in London until August 31, 1933. During his period of employment by the English company he duly paid tax on the salary received from that company.

(*d*) On August 31, 1933, the respondent was appointed vice-president in charge of overseas sales for the American company. The respondent was offered and accepted the appointment while at Dayton, which he was visiting at the time. There was no formal agreement in writing.

(*e*) The respondent's duties were to supervise the sales of the products of the American company throughout the world (except the United States and Canada) whether sold direct by them or through agents or subsidiary companies. His place of employment was at the office at Dayton, U.S.A., of the American company, and he was paid from that place. At the respondent's request payment was made to his credit in a banking account in Canada, and he drew on that account such money as he from time to time required.

(*f*) The respondent's only place of residence during the years under appeal was at Beaconsfield, in England, where he resided with his wife in a house which he had bought some years ago in her name. The house was the wife's property, being a gift from the respondent.

(*g*) The respondent put in a list of his business tours between August 29, 1933, and May 4, 1935, from which it appeared that he was out of the United Kingdom for 195 days in the year 1934–35.

(*h*) While the respondent was engaged in his duties in any particular country the subsidiary company of the American company operating there provided him with office accommodation and staff at the expense of the subsidiary company.

The respondent stated in evidence that he was employed in the United States of America and that his duty to the American company took him over the greater part of the world. His headquarters and administrative base were at Dayton, Ohio, where he had an office with sixteen employees. In general, he spent eight weeks at Dayton in each year, when he discussed the general policy for the future with the president and officers of the American company and received instructions in relation thereto. So long as he effectively supervised the overseas trade he was to a large extent his own master as to the manner in which he performed his duties and in particular as to the countries to be visited in each year. His salary did not vary with and was not dependent upon the number of his visits to the countries within the overseas area. In the United Kingdom he supervised only one manager, being the manager of the English company in London, but had seldom conferred with him in a supervisory capacity, as the business was going well. He had not been in any other part of England on the company's business. He had nominally five employees in London, but only a secretary and typist were his real full-time employees. None of them was paid by him personally.

The respondent made a return of income for the year 1933–34 in which he included under the head " Dominion and Foreign " securities and possessions " remittances of income arising from his employment amounting to 1216*l.*, and claimed as a deduction therefrom the sum of 260*l.*, made up of 145*l.* for use of car for business purposes and 115*l.* for entertaining.

In cross-examination the respondent stated that his claim for 115*l.* expenses for entertaining related to the entertainment of foreign agents and managers of foreign subsidiary companies upon their visits to England while he was here, and that his claim for 145*l.* car expenses was incurred in respect of such

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persons while in this country. He agreed that after foreign visits he always returned to England, because his wife and child lived at Beaconsfield. He had no residence of his own at the present time and did not think there would be any objection to his residing in the U.S.A., if he so desired.

Counsel contended on behalf of the respondent :—

(*a*) that the respondent should not be assessed under Sch. E but under Case V., r. 2, of Sch. D on remittances actually received in this country.

(*b*) that the respondent's employment was one and indivisible and that the whole source of his income was overseas (see per Lord Cave L.C. in *Foulsham* v. *Pickles* (1)).

(*c*) that on the facts the respondent was employed by the American company at their headquarters at Dayton, Ohio, which was also the respondent's base.

(*d*) that the respondent was permanently employed in the United States even though he visited from time to time other portions of the world (including the United Kingdom) as an incident of his service to the American company.

(*e*) that the respondent did not during the periods in question carry on his employment partly in the United Kingdom and partly elsewhere, but that his employment was wholly out of the United Kingdom.

(*f*) that by virtue of the fact that he was resident in England for less than six months in the year 1934–35 the respondent should be held to be a non-resident for that year, and that r. 2 of the Miscellaneous Rules applicable to Sch. D applied.

H.M. Inspector of Taxes contended as follows :—

(*a*) that in both of the years 1933–34 and 1934–35 the respondent was residing in the United Kingdom, and in each of these years carried on an employment partly in the United Kingdom and partly elsewhere.

(*b*) that by virtue of Sch. D, para. 1 (*a*) (ii.), of the Income Tax Act, 1918, and s. 18 of the Finance Act, 1922, the respondent was chargeable to income tax under Sch. E in respect of the whole of the profits of the employment, whether carried on in the United Kingdom or elsewhere and whether remitted to the United Kingdom or not.

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(1) [1925] A. C. 458, 463 ; 9 Tax Cas. 261, 287.

(*c*) that inasmuch as the respondent was resident in the United Kingdom and his employment was partly carried on in the United Kingdom he was chargeable to tax under Sch. E and not under Case V. of Sch. D.

In reply counsel for the respondent pointed out that the Finance Act, 1922, s. 18, specifically reserved as not to be transferred to Sch. E any income arising under Case V. of Sch. D.

The Commissioners found on the facts that the respondent was resident in the United Kingdom for the two years ending April 5, 1935, but that the source of employment was in the U.S.A. and that he should be assessed under r. 2 of Case V. of Sch. D of the Income Tax Act, 1918.

Lawrence J. said that the question was whether or not the respondent's income fell to be taxed under Sch. E by virtue of s. 18 of the Finance Act, 1922, read in conjunction with Sch. D, para. 1 (*a*) (ii.) and Case II., or fell within Case V. of Sch. D, in which case it was expressly excluded from the operation of s. 18 and did not fall to be assessed under Sch. E. It was contended by the Crown that the decision of the Commissioners was wrong and that the respondent's income did not arise from a possession out of the United Kingdom; and it was said that when the possession was an office or employment, the whole of the exercise of that office or employment must be out of the United Kingdom in order to bring it within Case V. The Solicitor-General relied upon the words of Lord Cave L.C. in *Foulsham* v. *Pickles* (1) and on *Davies* v. *Braithwaite.* (2) On the other side it was contended by Mr. Radcliffe for the respondent that although, if the possession said to come within Case V. was a trade, as in *Colquhoun* v. *Brooks* (3), or a profession, as in *Davies* v. *Braithwaite* (2), it was true that it must be exclusively and wholly outside the United Kingdom in order to fall within Case V., yet if the possession was an office or employment there was a distinction.

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(1) [1925] A. C. 458; 9 Tax Cas. 261.

(2) (1933) 18 Tax Cas. 198, 210.

(3) (1889) 14 App. Cas. 493; 2 Tax Cas. 490.

In the case of the trade or profession the source of the income was that trade or profession, but in the case of an office or employment the source of income, he contended, was not the performance of the work but the contract with the employers from whom the income sprang. That, Mr. Radcliffe said, was the rule deducible from *Colquhoun* v. *Brooks* (1) and *Foulsham* v. *Pickles*. (2) In the state of the authorities he (his Lordship) came to the conclusion that the Commissioners were right in deciding that this case fell within Case V.

The inspector of taxes appealed. The appeal was heard on December 13, 14 and 15, 1937.

Sir Terence O'Connor S.-G. and *R. P. Hills* for the appellant. In order that the salary arising from an employment may come within Case V. of Sch. D of the Income Tax Act, 1918, as being "income arising from possessions out of the United "Kingdom" the employment must be in all respects abroad: *Colquhoun* v. *Brooks*. (1) That case decided that a trade, profession, or employment was a "possession" within the meaning of Case V. It was a case relating to a trade wholly carried on outside the United Kingdom, but that the same principle applied to an employment was made clear by *Foulsham* v. *Pickles*. (2) A trade carried on partly in this country ceases to be a possession outside the United Kingdom. So, too, in *Foulsham* v. *Pickles* (2), the fact that an employment carried on wholly outside the United Kingdom was paid here was sufficient to prevent it coming within Case V.; but it would have been sufficient also to prevent it if any part of the employment had been performed in this country: see per Lord Cave in *Foulsham* v. *Pickles*. (3) The source of the income must be outside the United Kingdom, as was made clear in *Colquhoun* v. *Brooks* (1), and this involves the trade, profession, or employment being carried on wholly outside the United Kingdom: *London Bank of Mexico* v. *Apthorpe* (4); *San Paulo (Brazilian) Ry. Co.* v. *Carter* (5); *Davies* v. *Braithwaite*. (6)

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(1) 14 App. Cas. 493.

(2) [1925] A. C. 458.

(3) Ibid. 462.

(4) [1891] 1 Q. B. 383; [1891] 2 Q. B. 378; 3 Tax Cas. 143.

(5) [1896] A. C. 31.

(6) 18 Tax Cas. 198.

In *Davies* v. *Braithwaite* (1) the source of income was a profession, and as it was partly carried on here the whole of the income was taxable as not coming within Case V. when by r. 2 of Case V. only so much of the income as was brought to this country would have been taxable. The fact is that the source of the income must be wholly outside the United Kingdom so as to come within Case V., and therefore every element connected with it must take place abroad; compare for a case relating to an employment *Eaton-Turner* v. *McKenna*. (2)

Cyril Radcliffe K.C. and *J. H. Bowe* for the respondent. In order that taxation should be made under Case V. the whole source of the income must be outside the United Kingdom. This case is distinguishable from those of a trade or profession. In these cases the source of the income is the place where the trade or profession is carried on. That was the test in regard to a trade laid down in *Colquhoun* v. *Brooks*. (3) In the case of an employment also it is necessary to look to the source of the income, and that is the place where the contract of employment was entered into with the employers under which the right to payment arose. Accordingly the source of income here was outside the United Kingdom. This view accords with *Foulsham* v. *Pickles* (4); it is not contrary to what was said there by Lord Cave and certainly accords with the judgments of Lord Dunedin and Lord Buckmaster. The Crown have not an option to charge to income tax under Case II. or Case V. In the case of income arising from possessions out of the United Kingdom Case V. applies, and under r. 2 of the rules applicable to Case V. the charge is only on so much of that income as is remitted to this country.

R. P. Hills in reply. This is a case which plainly comes within the words of Sch. D., Case II. Any one seeking to say that it is not within Case II. must therefore bear a considerable burden. It is sought to give the decision in *Colquhoun* v. *Brooks* (3) a narrower meaning than it properly has. It does not mean that, to bring a case within Case V. it must have a

(1) 18 Tax Cas. 198.
(2) [1937] A. C. 162.
(3) 14 App. Cas. 493.
(4) [1925] A. C. 458.

foreign element. It must be entirely foreign. That is the principle applied also in *Foulsham* v. *Pickles* (1); see in particular Lord Cave's speech. Any home element is enough to keep a case out of Case V., and that is the essence of the decision in *Foulsham* v. *Pickles*. (1)

SIR WILFRID GREENE M.R. On August 31, 1933, the respondent was appointed vice-president in charge of overseas sales of the National Cash Register Company, of Dayton, Ohio, in the United States of America. He had previously been in the employment of an English subsidiary of that company and, during that employment and during his employment as vice-president of the American company, his residence, as found by the General Commissioners, was in England. His duties under the employment, the terms of which were not contained in any written agreement, "were "to supervise the sales of the products of the American "company throughout the world (except the United States "and Canada), whether sold direct by them or through agents "or through subsidiary companies." The General Commissioners found that his place of employment was at the office at Dayton, Ohio, of the American company and that he was paid from that place. At his request payment was made to his credit in a banking account in Canada and he drew on that account such moneys as he from time to time required.

I need not go into the details of the facts of the case, which are fully set out in the Case stated and in the judgment of the learned judge. It is sufficient to say that the respondent during the relevant period was resident in this country, and a part of his duties as vice-president of the American company (and by that I mean a not unsubstantial part) was performed in this country. He had to visit the various countries of the world, except the United States and Canada, and supervise the sales of the company's products, and, to a certain extent (and, as I say, a not unsubstantial extent), that task of supervision was carried out in this country in reference to

(1) [1925] A. C. 458.

sales here. The payment of his salary was made throughout by payments into his banking account in Canada.

The respondent was assessed under Sch. E in respect of his remuneration as vice-president for the years in question in sums which amounted, or were intended to amount, to his whole salary under that employment. The respondent appealed from that assessment, and the General Commissioners accepted the argument of the respondent that he was not assessable under Sch. E, but was assessable under Case V. of Sch. D, and that the measure of his liability was accordingly the actual amounts remitted to this country. The Crown appealed, and Lawrence J. decided in favour of the view which the Commissioners had taken.

The assessment in respect of the profits from employments, other than those which fall under Case V., is dealt with in s. 18, sub-s. 1, of the Finance Act, 1922. That sub-section states: "Such profits or gains arising or accruing to any "person from an office, employment, or pension as are, under "the Income Tax Act, 1918, chargeable to income tax under "Schedule D (other than the profits or gains chargeable under "Case V. of Schedule D, or under Rule 7 of the Miscellaneous "Rules applicable to Schedule D), shall cease to be chargeable "under that schedule and shall be chargeable to tax under "Schedule E, and the Rules applicable to that Schedule shall "apply accordingly subject to the provisions of this Act." The question therefore is: Does the present case fall within Case V. or does it fall within Case II.? In the latter event it will fall to be assessed under Sch. E, pursuant to s. 18 of the Act of 1922; in the former event it will not.

The first thing to remember in approaching this problem is that para. 1 under Sch. D defines the subject-matter of the tax, whereas para. 2 sets out the six different Cases under which the tax is to be charged. There is not involved, therefore, any comparison between one of the Cases set out in para. 2 and one of the subject-matters of taxation set out in para. 1. The comparison is a comparison between two Cases—namely, Case II. and Case V. The effect of these different Cases is to impose on the subject-matter of taxation six different categories, with the result that there may be matters which fall under one of the heads of charge mentioned in para. 1 which fall under different Cases in para. 2. To take an example which is connected with the subject-matter of the present appeal, para. 1 (*a*) (ii.) describes as one of the subject-matters of charge the annual profits or gains arising or accruing "to "any person residing in the United Kingdom from any trade, "profession, employment, or vocation, whether the same be "respectively carried on in the United Kingdom or elsewhere." Under that subject-matter of charge may be cases which will fall under Case II. or under Case V., according to their special facts. If the trade, profession, employment, or vocation is carried on within the United Kingdom, it will fall, in the case of a profession or employment, under Case II., and in the case of a trade under Case I. On the other hand, if the trade, profession, employment, or vocation is carried on entirely outside the United Kingdom, it will fall under Case V. The question, therefore, in the present case is: Were the annual profits received by the respondent received as income arising from possessions out of the United Kingdom or were they received in respect of a profession or vocation under Case II. ?

It is settled beyond the possibility of a doubt that the word "possessions" in Case V. extends to cover trades, professions, employments, and vocations. That was settled as long ago as *Colquhoun* v. *Brooks* (1), which dealt with the case of a trade, but the reasoning in which has been held by subsequent cases to extend to professions and employments. It is not suggested that we have to deal here with a case where the Crown has an option to choose the Case under which the assessment is to be made. The argument presented on behalf of the Crown was that the case did not fall within Case V. They never suggested that it was a case which fell both within Case II. and Case V.; it is one or the other. As I have said, the word "possessions" in Case V. has been finally construed as covering cases of trade, profession, or employment, and the argument put forward on behalf of the Crown may be succinctly stated thus: It is said that the only trades, professions, or

(1) 14 App. Cas. 493.

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employments, or vocations which fall within the word "possessions" in Case V. are trades, professions, employments, or vocations wholly carried on outside the United Kingdom. In other words, it is said that the moment there is found any act done by a trader in the course of his trade, any act done by a professional man in the course of his profession, or any act done by an employee in the course of his employment, in the United Kingdom, the possession (namely, the trade, profession, or employment) cannot be described as a possession out of the United Kingdom, and it is said that that proposition is to be found in the reasoning in *Colquhoun* v. *Brooks* (1), and that there is nothing in the subsequent case, which has been much debated before us, of *Foulsham* v. *Pickles* (2) which alters that position.

We have examined very carefully the judgments in *Colquhoun* v. *Brooks* (1), and, in my opinion, they establish the proposition that the word "possessions" in Case V. is referring to and means "sources of income"; and, secondly, that among "sources of income" is a trade. As I have said, in subsequent cases where the principles of *Colquhoun* v. *Brooks* (1) were followed, it was held that professions and employments were sources of income within the meaning of that proposition. I do not wish to burden this judgment with too many references to authority, but there is a passage which brings that point out quite clearly in the speech of Lord Macnaghten in *Colquhoun* v. *Brooks* (3): "Turning now to the 'fifth case,' I "ask, why are not the respondents' profits and gains from "his Melbourne business within the 'fifth case'? What is "the meaning of the term 'possessions' in that 'case'? "The word 'possessions' is not a technical word. It seems "to me that it is the widest and most comprehensive word "that could be used. Why, for instance, should not 'possessions "'in Ireland' mean everything, every source of income that "the person chargeable has in Ireland, whatever it may be? "Why should not 'profits from possessions out of Great "'Britain,' which is to be found in Schedule G, No. XI., and

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(1) 14 App. Cas. 493.
(2) [1925] A. C. 458.
(3) 14 App. Cas. 516.

"recalls the expression 'income out of Great Britain' in the "Act of 1799, mean profits from every source of income "abroad? I use the expression 'source of income,' because it "is as a source of income that the Act contemplates and deals "with property, and everything else that a person chargeable "under the Act may have, and the Act itself, in sect. 52, "uses the expressions 'sources chargeable under the Act' "and 'all the sources contained in the said several schedules' "as describing everything in respect of which the tax is "imposed."

Following up that proposition, the question which falls to be decided in any particular case appears to me to be this: Is the source of the income which it is sought to charge a source out of the United Kingdom or is it not? It is said, and with truth, that in *Colquhoun* v. *Brooks* (1) the particular source of income there dealt with was a trade, and a trade wholly carried on outside the United Kingdom. It is sought to limit the effect of the decision in *Colquhoun* v. *Brooks* (1) to cases where not merely a trade but professions and employments are carried on wholly out of the United Kingdom. I shall show in a moment why authority makes it, in my opinion, quite impossible to adopt that view of *Colquhoun* v. *Brooks*. (1) But leaving aside for the moment the authority to which I refer—namely, *Foulsham* v. *Pickles* (2)—I find nothing in the reasoning in *Colquhoun* v. *Brooks* (1) to justify the argument. In respect of trade there was a particular provision in the Income Tax Act which made it quite clear that a trade partly carried on outside the United Kingdom was not regarded as a foreign possession.

Apart from that particular provision I think it is just to observe that there is an inherent difference between a trade and a profession on the one hand and an employment on the other when one is considering the essential question which is to be looked at—namely, what is the source of the income? Trades and professions are, so to speak, based on activity, either by the persons carrying on the trades or the persons carrying on the professions. A trade or profession is not attached to

(1) 14 App. Cas. 493.

(2) [1925] A. C. 458.

some specific contract, and, accordingly, in such a case it is impossible to put a finger on a particular contract as the source of the income. The profits of the profession and the profits of the trade come from the general state of activity of the trader or the professional man, and, having regard to the fact that trades and professions are not to be divided up, if a doctor carries on his profession in England and abroad you cannot treat that as being two professions ; he is carrying on the one profession. Similarly a trader who carries on a trade in England and also abroad is carrying on one trade, assuming that it is the same trade and not a distinct trade. The fact that part of his trade is carried on abroad does not make it a distinct trade any more than the fact that a profession is carried on partly abroad makes it a distinct profession, with the result that, when once it is found that the trader or the professional man is carrying on a trade or profession in this country, it is impossible to predicate of that trader or professional man that the source of his income is a source out of the United Kingdom. But in the case of employment different considerations arise. Employment arises from a contract of employment and, therefore, there is what there is not in the other cases, some definite contract to which to look when inquiring into the source of the income which it is sought to charge. I should have thought, therefore, that in the case of employment the contract is the first thing which must be looked at to find out the answer to the question raised in any particular case of employment : Is it or is it not income derived from a source out of the United Kingdom ? As I have said, I am quite unable to find in *Colquhoun* v. *Brooks* (1) any rule laid down or anything in the reasoning which compels us to say, as the Crown here would have us say, that in no case where part of the activities of the employment take place in this country can the income be said to be derived from a source out of the United Kingdom.

But the matter does not rest there, because the question of the applicability of Case V. to the case of employment has been considered by the House of Lords, and I accordingly

(1) 14 App. Cas. 493.

turn for guidance to that decision—namely, *Foulsham* v. *Pickles*. (1) That was a case where an agent of a British company in West Africa was assessed under Case V. The facts regarding his employment, as they were assumed to be for the purpose of the decision, were that the whole of the work to be done under his employment was done outside the United Kingdom in West Africa, but the remuneration was payable by the company, his employers, in the United Kingdom, and was paid into a banking account in England on which his wife had the power of drawing. He was held to be resident in the United Kingdom and the Special Commissioners held on appeal that he was properly assessed under Case V. It is to be observed that in that case the Crown was supporting the assessment under Case V. In other words, they were maintaining that where a man is employed entirely outside the United Kingdom, in the sense that the work to be done under his employment is done outside, and wholly outside, the United Kingdom, Case V. was the Case applicable; that the circumstance, in other words, that the work was wholly done outside the United Kingdom involved the result that the source of income was outside the United Kingdom. That was the proposition which was put forward. That that is so appears quite clearly from the arguments which were put before the House on behalf of the Crown. For instance, the Solicitor-General, appearing for the Crown, said (2) : " The respondent's employ-" ment being carried on in West Africa was an employment " carried on elsewhere than in the United Kingdom and, " accordingly, is one of the sources the profits of which are " chargeable as income arising from possessions out of the " United Kingdom to the extent of the amount remitted to " or received in the United Kingdom." Then he said (3) : " In the appellant's submission the locality of the employment " does not depend upon where the contract is made but " upon where the employment is in fact carried on, and this " employment was carried on in West Africa." That was the argument which was presented. In my opinion, if there is one thing that that case did it was entirely to negative the proposition that the locality of the employment depended on the place where the employment was in fact carried on. Had that proposition been accepted the result, of course, would have been that the Crown would have succeeded and the case would have been a Case V. case.

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(1) [1925] A. C. 458.
(2) Ibid. 459.
(3) Ibid. 460.

Mr. Hills, in his argument in this case, would have had us hold that the decision in *Colquhoun* v. *Brooks* (1), which dealt with a trade which was carried on entirely outside the United Kingdom, must be taken as applying also to the case of employment, in the sense that the only case which comes under Case V. would be where the work done under the employment is wholly done outside the United Kingdom. That proposition of his appears to me to be completely inconsistent with the decision in *Foulsham* v. *Pickles*. (2) Had it been right, the analogy to the trading outside the United Kingdom in *Colquhoun* v. *Brooks* (1) would have been the performing of the services outside the United Kingdom in *Foulsham* v. *Pickles* (2), and the result would have been that the Crown would have succeeded in *Foulsham* v. *Pickles*. (2) As I have already said, I think that the decision is quite inconsistent with that argument.

It is perfectly fair to point out, as was pointed out on behalf of the Crown, that the decision in that case was that the employment there dealt with did not fall within Case V., and it was said that it would not be legitimate to treat that case as a decision the effect of which would be to bring within Case V. a different case. But the decision must be examined for the purpose of seeing not merely what was in fact decided but what was the reason for that decision. There were concerned in that decision five noble and learned Lords—Lord Cave L.C., Lord Dunedin, Lord Atkinson, Lord Sumner, and Lord Buckmaster. Of those, three only delivered full and reasoned opinions—Lord Cave, Lord Dunedin, and Lord Buckmaster. Lord Atkinson in terms agreed with the speech of Lord Dunedin; Lord Sumner agreed in terms with the speech of the Lord Chancellor. Whether or not there is any difference in principle between the speech

(1) 14 App. Cas. 493.

(2) [1925] A. C. 458.

of the Lord Chancellor and the speeches of Lord Dunedin and Lord Buckmaster is a matter which requires examination. But, if there be a difference, the result will be that the only two noble and learned Lords to whom Lord Cave's views must be attributed are Lord Cave himself and Lord Sumner. And if there be any difference in view as to the principles applicable then there are three members of the House who, I shall show, took a view different from that of Lord Cave—assuming that on the true construction of Lord Cave's speech there is really any difference.

Lord Cave pointed out (1) that the greater part of the arguments on behalf of the Crown were directed to establishing the proposition that an employment could be a possession within the meaning of Case V., and he then pointed out that that was decided in *Colquhoun* v. *Brooks* (2) on the ground that the reasoning in *Colquhoun* v. *Brooks* (2) was just as much applicable to employment as it was to trade. In the present appeal it was sought from that observation to build up an argument to the effect that what Lord Cave said was that the principle to be extracted from *Colquhoun* v. *Brooks* (2) only applied to the case where all the acts under the contract of employment were carried on out of this country. I ventured to point out that, when the references to the speeches in *Colquhoun* v. *Brooks* (2) are looked at, it is possible to identify the very passages to which Lord Cave was there referring, and the references were to the passages where the question as to the meaning of " possessions " under Case V. is examined by itself, and apart from anything else, to see what it means. One of the passages was the passage which I have just read from the speech of Lord Macnaghten.

Lord Cave, after quoting this passage from Lord Macnaghten, said (3) : " This conclusion appears to me to apply to "an employment out of the United Kingdom which " (like a trade) is a source of income ; and I do not doubt that " (to take two simple instances) a doctor residing in England " and practising in France only, or a mining engineer having

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(1) [1925] A. C. 462.
(2) 14 App. Cas. 493.
(3) [1925] A. C. 463.

"a residence here and wholly employed by a Spanish mining "company in Spain, might be held to have a foreign possession "and to be assessable under Case V." Pausing there for a moment, the fact that in the case of an employment the example chosen by the Lord Chancellor is one where the employee is wholly employed abroad is relied on in support of an argument that Lord Cave was intending to lay down the proposition that, in the case of employment, all the employment—by which is meant the acts done under the contract of employment by the employee—must be out of the United Kingdom. The circumstance that he chooses that example does not appear to me to warrant any such conclusion as to the meaning of his language. He went on: "But assuming this to "be so, it does not follow that the appellant is entitled to "succeed in his appeal. For that purpose it is necessary for "him to show that the respondent's employment was wholly "out of the United Kingdom, and that (to use Lord "Macnaghten's expression) the whole source of his income "was overseas; and this, in my opinion, he has not shown." Pausing there for a moment, I think that the language of Lord Cave is susceptible of two different constructions. He may have meant when he refers to employment wholly out of the United Kingdom that all the acts done by the employee would have to be done out of the United Kingdom, or he may have used the word "employment" in the sense of "source of "income," and really as meaning the same thing as what he says in the following words—"that the whole source of his "income was overseas." It is not possible to say that the language of the Lord Chancellor is so clear as to leave it past doubt which of those two alternatives he meant. He proceeded: "I will assume—although I feel some doubt on the "point—that the respondent's services to the company were "to be rendered in West Africa only, and that he had no "duties to his employers while he was in England; but it "remains true that the commission, which was the principal "remuneration for his services, was, under the terms of his "employment, payable in England only, and that he was "precluded by the express terms of his agreement from "drawing or claiming payment of that commission in the colony. "In other words, while the burdens incidental to his employment were to be borne wholly or mainly abroad, the principal "benefit which he was to derive from it could only be claimed "in the United Kingdom. In these circumstances I do not "think it can be said that his source of income was wholly "outside this country, so as to bring him within Case V." There again I feel some little difficulty in determining which of the two alternative meanings is to be placed on the language of Lord Cave, but I am prepared to assume for the purpose of this judgment that Lord Cave meant to say that, in his opinion, in order that income from an employment can be income from a possession out of the United Kingdom, the work done by the employee under his contract of employment, quite apart from anything else, must be performed wholly out of the United Kingdom. As I say, I am not at all satisfied that that is what the Lord Chancellor meant, but I am prepared to assume that that is what he did mean, and accordingly that Lord Cave and Lord Sumner are to be taken to have held that view.

But the next opinion which must be looked at is the opinion of Lord Dunedin, in which Lord Atkinson concurred. Lord Dunedin first of all, as Lord Cave had done, held that the effect of *Colquhoun* v. *Brooks* (1) had been to decide that an employment might be a possession out of the United Kingdom within the meaning of Case V. He then dealt with the second proposition involved in the case—namely, that the possession was out of the United Kingdom in the case before him, and said (2): "When, however, I come to the second proposition I "find myself unable to affirm that this is income arising from "a possession out of the United Kingdom. This income comes "from the contract of employment made in the United "Kingdom. When I say made in the United Kingdom I am "not referring to the place where the signing of the contract "took place. I am referring to the source of the profit which "is the payment which the employers covenanted to make, "This was payable and paid in London." He then referred

(1) 14 App. Cas. 493.

(2) [1925] A. C. 466.

to r. 2 of Case V. When that language is examined it is to my mind quite impossible to hold that the question what was the source of the profit—which, after all, was the one question which the House was setting itself in that case—is affected in the mind of Lord Dunedin by the place where the services were performed. When Lord Dunedin said: "I am referring to the source of the profit which is "the payment which the employers covenanted to make," I construe that as meaning that the source of the profit was the provision in the contract for payment. At that stage I pause to say that it was not suggested either by the Solicitor-General in opening this case or by Mr. Hills that the arrangements under which payment was made in Canada in this case were such as to differentiate the case in any respect from that of *Foulsham* v. *Pickles* (1) so far as regards the matter of payment. Accordingly the matter was not dealt with by counsel on behalf of the respondent, but in his reply Mr. Hills did in passing call attention to the language of that finding. I myself am unable to see that there is any real difference, and for the reason that I construe the finding as meaning that, whatever the original contract may have been and whether or not it was silent with regard to the place of payment, the parties had agreed on Canada as the place of payment. The result, therefore, is that the contract must be regarded for present purposes as a contract for payment in Canada.

Turning again to the opinion of Lord Dunedin, the one thing that Lord Dunedin is quite clearly not accepting is the proposition which the Crown had put forward—namely, that the locality of the employment depends on where the work of the employee is in fact carried out. The place where the work is carried out is not mentioned by Lord Dunedin in that passage, nor indeed is it mentioned anywhere else, and it is quite clear that Lord Dunedin in considering what is the source of the profit did not regard that matter as a matter to which his mind should be directed. Precisely the same thing appeared in the opinion of Lord Buckmaster. He also dealt with the

(1) [1925] A. C. 458.

meaning of the word "possessions" and proceeding to deal with the source of income in the case before him, said (1): "In the present case I do not think that the source of income "was the employment of the respondent in West Africa. "The source of his income was the money paid by an English "company into an English bank in pursuance of an agree-"ment for service made in this country." He then referred, as Lord Dunedin had, to r. 2 of Case V. It is perfectly true that Lord Buckmaster there referred not merely to the English character of the company, but also to the place where the agreement for service was made. I do not regard the mention of those circumstances as involving any difference in view between Lord Buckmaster and Lord Dunedin as to the real test of the source of income. Then again Lord Buckmaster started off by negativing as clearly as it could be negatived the proposition that, for the source of income, the place where the work of the employee was done was to be looked at. He said: "I do not think that the source of income was the "employment of the respondent in West Africa." That, therefore, he puts out of consideration as not being the test, and then he proceeded to point out the circumstances in that case which made the source of income an English source of income.

It seems to me necessarily to flow from the reasoning of the majority of the House in that case—even assuming, without deciding, that Lord Cave's reasoning is inconsistent with it—that in considering the source of income in the case of an employment regard is not to be had to the place where the tasks of the employee are performed. It is quite impossible to my mind that the speeches to which I have referred could have been couched in the language they were if any such matter had been considered to be a relevant matter. Indeed Mr. Hills would have us read Lord Buckmaster's opinion and Lord Dunedin's opinion as meaning that, in considering what is the source of the income and whether that source is abroad, it is sufficient that some part of the things done under the contract of employment should be done in this country, and in that case one such thing was done—namely,

(1) [1925] A.C. 468.

the payment. If there is one meaning which it is quite impossible to extract from the language used I should have thought it was that. It seems to me that that is imputing to the noble and learned Lords concerned a singular lack of felicity in language and an inability to express their true meaning. The language, it seems to me, quite clearly establishes the proposition that the place where the work is carried out is not a matter to which attention should be directed. If I am right in my view as to the effect of *Foulsham* v. *Pickles* (1) it has the result in this case that the test for ascertaining the source of income is to look for the place where the income really comes to the employee, and that place is Canada. That is where the source is, and it is outside the United Kingdom. It follows that this appeal must be dismissed with costs.

ROMER L.J. It was decided by the House of Lords in *Colquhoun* v. *Brooks* (2) that the word "possessions" in Case V. of Sch. D includes every source of taxable income which is situated abroad.

It was argued before us by Mr. Hills that all the House of Lords intended to decide in that case, so far at any rate as concerned employment, was that the word "possessions" in Case V. included an employment if, but only if, that employment was wholly carried on abroad. In my opinion that is not the effect of *Colquhoun* v. *Brooks.* (2) It was much wider than that. It was held, as I read the case, that whenever there is a source of income of which it can properly be said that it is wholly situated abroad, that source of income falls to be taxed under Case V. of Sch. D and not under Case I. or Case II. It is true, as was pointed out by Mr. Hills, that the whole of the reasoning upon which Lord Herschell and Lord Macnaghten based their conclusion that trades were included in the word "possessions" in Case V. is not applicable to the case of an employment. But Lord Herschell and Lord Macnaghten found, after examining the relevant statutory provisions, that the Legislature had expressed a clear intention that the word "possessions" in what then corresponded to Case V.

(1) [1925] A C. 458.

(2) 14 App.. Cas. 493.

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of Sch. D included what in truth is not a possession at all—namely, a trading activity carried on abroad. Having arrived at the conclusion that a trade was included in the word " possessions " it would have been impossible for them logically to come to the conclusion that the word " possessions " in Case V. did not extend to every source of taxable income whatever that source might be, although in reference to those other sources the Legislature might not have expressed its intention as clearly as it had expressed it in the case of trades.

I therefore approach this case on the footing that every source of income of which it can be legitimately said that it is situated wholly abroad is taxable under Case V. of Sch. D. In these circumstances it has to be ascertained in cases of trades, professions, vocations and employments where the source of income is situated. Naturally that cannot be decided without knowledge of what is the source of income. Take the case of a partner, resident here, in a trade carried on wholly abroad. What is his source of income? Is it the partnership deed which secures to him a share in the profits of the partnership? Is it the activities of himself or his co-partners exercised abroad? Or is it the body of commercial contracts entered into with traders that produces the money out of which the profits, and therefore the income, are ultimately derived? Or can it be said that the customers themselves are the source of income?

As regards a trade I am glad to say that the question has been decisively solved and solved in the way in which one would have expected it to be solved. It was held by Lord Esher in *London Bank of Mexico* v. *Apthorpe* (1) that for the purpose of ascertaining the source of income regard must be had to the place where the business was done, that is, the place where the trade was carried on; and if it was carried on solely abroad, then the case would fall within Case V. The same view was expressed by Lord Sumner in *Mitchell* v. *Egyptian Hotels, Ld.* (2) Lord Sumner there pointed out that, in considering whether the business activities had been conducted wholly abroad, it was necessary to include amongst

(1) [1891] 2 Q. B. 378.

(2) [1915] A. C. 1022.

the business activities even a passive oversight and tacit control so that, although the business activities were conducted abroad, yet a passive oversight and tacit control in this country would afford a sufficient reason for saying that the source of the income was not wholly situated abroad.

As regards a profession or vocation there can again be no doubt. The source of income is situated at the place where the profession or vocation is exercised or carried on, as was indeed pointed out by Lord Cave in *Foulsham* v. *Pickles* (1), where he gave as an instance of a profession being situated wholly abroad the case of a doctor going abroad and exercising his profession there. Lord Cave did not refer to the locality of the patients, for instance, from whom the doctor's income was earned, and who, in one sense, of course, might be regarded as the source of the doctor's income. The activities of the doctor in carrying on his profession abroad constituted the source of his income.

Consistently with those decisions I confess that I should have expected to find that in the case of an employment the locality of the source of income was the place where the employment was actually carried on by the employee, that is to say, the place where the activities of the employee were exercised, because I should have thought it would be held consistently with the cases relating to trade that the activities of the employee were the source of the income which he derived from his employment. Of course, in one sense it may be said that the source of the income which he earns by his activities is his contract of employment. Another possible view, I suppose, would be that the source of his income is his employer, so that the locality of the source of income, is the locality—which, I suppose, means the usual place of residence—of the employer. The House of Lords, however, as it seems to me, in *Foulsham* v. *Pickles* (1) have definitely decided that in the case of an employment the locality of the source of income is not the place where the activities of the employee are exercised but the place either where the contract for payment is deemed to have a locality or where

(1) [1925] A. C. 458.

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the payments for the employment are made, which may mean the same thing.

We were invited by both the Solicitor-General and Mr. Hills to put a gloss on the language used by the noble and learned Lords who decided that case. In my opinion it would not be respectful of us to do so. That being so, it seems to me that this appeal must necessarily fail.

MacKinnon L.J. I agree. The respondent's liability to taxation arises under Sch. D, para. 1 (*a*) (ii.), which says: "Tax under this Schedule shall be charged in respect of— "(*a*) The annual profits or gains arising or accruing . . . . "(ii.) to any person residing in the United Kingdom from any "trade, profession, employment, or vocation, whether the "same be respectively carried on in the United Kingdom or "elsewhere." The respondent's liability arises, therefore, from his residence here; but for the purpose of deciding whether that liability is under Case II. or Case V. of Sch. D the fact of his residence here is irrelevant and immaterial. I think it well to emphasize that, because, in deciding whether Case II. or Case V. applies, the mind might be, perhaps, unconsciously influenced by the fact that the man is a resident in the United Kingdom. The only question is whether his liability to taxation is under Case II. or Case V.

If the matter stood free from authoritative exposition, it might well be a matter of grave doubt whether the words "income arising from possessions out of the United Kingdom" in Case V. could apply to income arising from a trade, profession, employment, or vocation; but *Colquhoun* v. *Brooks* (1) clearly decides that those words do cover income arising from a trade and inferentially from the other sources, and *Foulsham* v. *Pickles* (2) clearly decides that they cover income arising from employment. *Colquhoun* v. *Brooks* (1) further decides, clearly, as I think, that the test of the locality of a trade or employment is to ascertain the source of the income arising from that trade or employment. The question then is: What is the source of the income of the respondent's

(1) 14 App. Cas. 493.

(2) [1925] A. C. 458.

employment? Again on the combined authorities of *Colquhoun* v. *Brooks* (1) and *Foulsham* v. *Pickles* (2) I think, clearly, that it was in Ohio in the United States. I think that follows from *Foulsham* v. *Pickles* (2), especially the opinion of Lord Cave L.C. (3); of Lord Dunedin (4); and of Lord Buckmaster. (5)

The contract under which the respondent was employed was made in Ohio, and his remuneration arising from that contract was paid to him in Canada by remittance from Ohio. There is only one factor with regard to his employment which is relied on for an argument that the source of his income from his employment was in the United Kingdom and not abroad, and that factor is that some, or perhaps most, of the work that his employment required him to do was done in the United Kingdom. Again I remind myself in this connection that the fact that he is residing here is for this purpose immaterial. But in *Foulsham* v. *Pickles* (2) the whole of the work of Mr. Pickles in his employment was done in West Africa. None the less it was held that the source of his income was the United Kingdom and not West Africa or anywhere else abroad, and, as Lord Buckmaster said: "In "the present case I do not think that the source of income "was the employment"—by which he must mean the work he did—" of the respondent in West Africa. The source of "his income was the money paid by an English company into "an English bank in pursuance of an agreement for service "made in this country." Substituting " the United Kingdom" for "West Africa" and "by an American company into a "Canadian bank in pursuance of an agreement for service "made in America" for "by an English company into an "English bank in pursuance of an agreement made in this "country," that passage is precisely applicable to this case. Therefore I agree, by virtue of those two authorities, that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Sheard, Breach & Co.*

H. C. G.

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(1) 14 App. Cas. 493.
(2) [1925] A. C. 458.
(3) Ibid. 463.
(4) Ibid. 466.
(5) Ibid. 468.

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In re THE SOLICITORS ACT, 1932.

In re TWO SOLICITORS.

Solicitor—Complaint to disciplinary committee—Dismissal of application without hearing applicant—Rule empowering committee, if no prima facie case made out, to dismiss application without a hearing—Validity of rule—Appeal of applicant to Divisional Court—Notice of appeal not served on solicitors—Right of applicant to appear in person—Appeal defective for want of parties—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 5, *sub-ss.* 1 *and* 2; *s.* 8*—Solicitors Act* (*Disciplinary*) *Rules*, 1932 (*St. R. & O.* 1932, *No.* 983), *rr.* 1, 2 *and* 3*—Solicitors Act* (*Disciplinary*) *Appeal Rules*, 1932 (*St. R. & O.* 1932, *No.* 984), *rr.* 5, 8.

The Solicitors Act (Disciplinary) Rules, 1932, provided by r. 2 that ". . . . in any case where, in the opinion of the Committee, "no prima facie case is shewn the Committee may, without "requiring the solicitor to answer the allegations, dismiss the "application . . . ."

An application was made to the Disciplinary Committee of the Law Society asking that two named solicitors might be required to answer certain allegations contained in the applicant's application. The Committee, purporting to act under the above mentioned rule, before fixing any day for the hearing of the application, and in the absence of the applicant, considered the application, and being of opinion that no prima facie case had been shown against the two solicitors, ordered that the application be dismissed without requiring the two solicitors to answer the allegations. The applicant appealed from that order to the Divisional Court by notice of motion. The sole respondent was the Registrar of Solicitors, the two solicitors not being made respondents. The applicant desired to conduct her appeal in person; but the Divisional Court refused to hear her on the ground that in any proceedings in the High Court under s. 5 of the Solicitors Act, 1932, the applicant must be represented by counsel. The applicant appealed to the Court of Appeal. The sole respondent to the notice of appeal was again the Registrar of Solicitors, the two solicitors not having been served with the notice of appeal:—

Held, (1.) that the appeal must be dismissed, because, the two solicitors not having been served with the notice of appeal, the appeal was defective for want of parties;

(2.) that inasmuch as a right of appeal from an order made by the Disciplinary Committee was given by s. 8 of the Solicitors Act, 1932, to both the applicant and the solicitor, the applicant was entitled to appear in person in support of her appeal, and the decision of the Divisional Court to the contrary effect was wrong.

Ex parte Pitt (1833) 2 Dowl. 439, and *In re A Solicitor. Ex parte The Incorporated Law Society* [1903] 1 K. B. 857; [1903] 2 K. B. 205 distinguished.

Held also, that r. 2 of the Solicitors Act (Disciplinary) Rules, 1932, under which the Disciplinary Committee purported to act in so far as it authorized the Committee to dismiss the application without hearing the applicant, was ultra vires, as the Solicitors Act of 1932 required that the order of the Committee should be made on a hearing.

Per Scott L.J. *quaere* whether *In re A Solicitor* [1934] 2 K. B. 463, where it was held that the words of s. 8 of the Solicitors Act, 1932, giving a right of appeal to an applicant were not so definite as to override the long established principle that there could be no appeal against an acquittal, was rightly decided.

Per Luxmoore J. that there was no order of the Disciplinary Committee from which an appeal lay, inasmuch as under the Solicitors Act of 1932 and the Rules made thereunder the order in respect of which the right of appeal was granted was an order made "on the hearing," and an order made, in the absence of the parties, on a preliminary consideration by the Committee of the question whether there was a prima facie case sufficient to justify a hearing, was not an order made on a hearing, and that the applicant's remedy was by way of mandamus and not by an appeal.

APPEAL from an order of the Divisional Court.

The following statement of facts is taken from the judgment of Luxmoore J.

On October 14, 1936, the appellant, Miss M. Marshall (hereinafter called the applicant), made an application in writing to the Disciplinary Committee of the Law Society constituted under s. 4 of the Solicitors Act, 1932, asking that two solicitors named in the application might be required to answer certain allegations which were ultimately embodied in an affidavit sworn by the applicant on October 17, 1936. This application was made under s. 5, sub-s. 1 (*b*), of the same Act. Without communicating with the solicitors and before fixing any day for the hearing of the application, and in the absence of the applicant, the Disciplinary Committee on November 5, 1936, considered the application.

The conclusions of the Committee were subsequently embodied in a document dated November 5, 1936, signed by the chairman of the Committee. The document was intituled: "Findings and Order of the Disciplinary Committee "constituted under the Solicitors Act, 1932." The material part of the document was in these terms: "Upon reading the "said affidavit of the applicant sworn the 17th October, 1936, "the Committee being of opinion that no prima facie case is "shewn against the said two solicitors, it is ordered that the "said application be dismissed without requiring the said "two solicitors to answer the said allegation."

On November 11, 1936, the applicant served on the Registrar of Solicitors a notice of motion to be heard in the Divisional Court of the King's Bench Division by way of appeal from the order of the Disciplinary Committee. The order sought by the notice of motion was "that the above "two solicitors shall be required to answer the allegations "contained in the affidavit of October 17th, 1936, accompanying "the application to the Disciplinary Committee and for an "Order that the Disciplinary Committee shall hear and determine these allegations or that any other Order shall be made "as the Court shall think fit for the determination of these "allegations."

The solicitors concerned were not respondents to this notice of motion, the sole respondent was the Registrar of Solicitors.

The motion came before the Divisional Court on four separate occasions. On each of the first three of these the hearing of the motion was adjourned owing to the illness of counsel instructed to appear for the applicant. Ultimately the motion came before the Divisional Court on February 2, 1937, when the Court refused any further adjournment. The applicant, who was not then represented by counsel, desired to conduct her appeal in person, but the Divisional Court declined to hear her on the ground that in any proceedings in the High Court under s. 5 of the Solicitors Act, 1932 (1), the applicant must be represented by counsel. The Divisional Court dismissed the appeal and ordered the applicant to pay the costs of it to the Registrar of Solicitors. Leave to appeal was refused.

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(1) The Solicitors Act, 1932, s. 5, sub-s. 1: "Any application ". . . . (*b*) by another person to "strike the name of a solicitor off "the roll, or to require a solicitor "to answer allegations contained

On February 16, 1937, the applicant obtained leave from the Court of Appeal to present an appeal from the order of the Divisional Court.

The notice of appeal asked for an order that the order of the Divisional Court dated February 2, 1937, might be rescinded or varied and for an order that the above two solicitors might be required to answer the allegations contained in the affidavit referred to in the notice of appeal to the Divisional Court dated November 11, 1936, and that the Disciplinary Committee constituted under the Solicitors Act, 1932, might hear and determine the allegations, or that any other order might be made for the determination of these allegations.

The sole respondent to the notice of appeal was the Registrar of Solicitors. Neither of the two solicitors had been served with the notice of appeal.

"in an affidavit, shall be made to "and heard by the Committee in "accordance with rules made "under the next succeeding "section. . . . ."

Sub-s. 2: "On the hearing of "any such application the Com-"mittee shall have power to make "any such order as to removing "from or striking off the roll the "name of the solicitor to whom "the application relates, as to "suspending him from practice, "as to the payment by any party "of costs, and otherwise in rela-"tion to the case as they may "think fit. . . . ."

Sect. 6, sub-s. 1: "The Com-"mittee, with the concurrence of "the Master of the Rolls, may "from time to time make rules for "regulating the making, hearing "and determining of applications "to the Committee under this "Part of this Act. . . . ."

Sect. 8: "An appeal against "any order made by the Com-"mittee under this Part of this "Act shall lie to the High Court "at the instance either of the "applicant or of the solicitor to "whom the application relates, "and every such appeal shall be "made within such time and in "such form and shall be heard in "such manner as may be pre-"scribed by rules made from time "to time by the Master of the "Rolls with the concurrence of the "Lord Chancellor and the Lord

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Maurice Share for the appellant. The decision of the Divisional Court was wrong. That decision was based upon one point only. The Court held that a client who was bringing charges against a solicitor was not entitled to appear in person but must be represented by counsel. The Court based its decision upon the decision in *In re A Solicitor. Ex parte*

"Chief Justice or (in case of "difference) of one of them."

The Solicitors Act (Disciplinary) Rules, 1932, dated July 28, 1932, made under s. 6, sub-s. 1, of the Solicitors Act, 1932, by the Committee appointed under the Act, with the concurrence of the Master of the Rolls :

Rule 1 : "An application to the "Committee . . . . to require a "solicitor to answer allegations "contained in an affidavit shall be "in writing under the hand of the "applicant in the form set out in "the Schedule, and shall be sent "to the Clerk to the Committee, "together with an affidavit by the "applicant, stating the matters of "fact on which he relies in support "of his application."

Rule 2 : "Before fixing a day "for the hearing the Committee "may require the applicant to "supply such further information "and documents relating to the "allegations as they think fit, and "in any case where, in the opinion "of the Committee, no prima facie "case is shewn the Committee "may, without requiring the solicitor to answer the allegations, "dismiss the application. If "required so to do, either by the "applicant or the solicitor, the "Committee shall make a formal "order dismissing such application."

Rule 3 : "In any case in which, "in the opinion of the Committee, "a prima facie case is shewn the "Committee shall fix a day for "hearing, and the Clerk to the "Committee shall serve notice "thereof on the applicant and on "the solicitor, and shall serve on "the solicitor a copy of the "application and affidavit. The "notice shall be not less than a "twenty-one days' notice."

The Solicitors Act (Disciplinary) Appeal Rules, 1932, dated July 29, 1932, made under s. 8 of the Solicitors Act, 1932.

Rule 1 : "An appeal from an "order of the Committee made "under the Act shall be brought "to the King's Bench Division of "the High Court of Justice."

Rule 2 : "The appeal shall be "by notice of motion, which shall "state the grounds of appeal, and "whether all or part only of the "order is complained of. The "notice of motion shall be a fourteen days' notice, and shall be "served on every party directly "affected by the appeal, and also "upon the Registrar . . . . "

Rule 5 : "The Registrar on "being served with the notice "shall send to the Crown Office "four copies of the Order appealed "from prefaced by a statement of "the findings of the Committee, "and a copy of the notes of "evidence taken on the hearing, "and of any affidavits used "thereon."

Rule 8 : "Every appeal shall "be by way of rehearing . . . . "

Incorporated Law Society. (1) In that case an application had been made to the Law Society that a certain solicitor should answer certain allegations of professional misconduct contained in an affidavit. The Statutory Committee made a report under the provisions of the Solicitors Act, 1888. On the consideration of that report by the Divisional Court the applicant claimed to be heard in person, and the Court, following a decision of Lord Denman in *Ex parte Pitt* (2) held that the applicant could not be heard in person but must appear by counsel. That decision was affirmed by the Court of Appeal. (3) The procedure now under the Solicitors Acts of 1919 and 1932 is completely different from what it was previously. In *Ex parte Pitt* (2), where there was an application calling upon an attorney to answer the matters contained in an affidavit, Lord Denman C.J. said: "The motion against an attorney "being in the nature of a criminal information the Court "requires that it should be made by a gentleman at the bar; "and it cannot be made in person." Collins M.R. said in *In re A Solicitor* (4): "So far as the appellant was endeavouring "to do by means of the modern machinery provided by the "Solicitors Act, 1888, what, under the old practice, would have "been done by a motion to strike the solicitor off the rolls, "or to call upon him to answer the matters contained in an "affidavit, I think it is quite clear that that can only be "done by a person through counsel representing him. I do "not think the old practice in that respect is affected by the "Solicitors Act, 1888." Under s. 13 of the Solicitors Act, 1888, an application to require a solicitor to answer allegations contained in an affidavit was heard by a committee of the Law Society who embodied their finding in the form of a report to the High Court, and the Court could make such order thereon as the Court thought fit. Under that Act the Committee had no power to make an order, but only to make a report to the Court. But under the Act of 1919 the procedure was entirely altered, and power was given to the Committee to make an order striking a solicitor off the roll of solicitors or

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(1) [1903] 1 K. B. 857.

(2) 2 Dowl. 439.

(3) [1903] 2 K. B. 205.

(4) [1903] 2 K. B. 207.

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requiring a solicitor to answer allegations contained in an affidavit subject to a right of appeal to the High Court, which was given by s. 8 both to the applicant and to the solicitor. The procedure was thereby not merely modified but revolutionized. It is now no longer a criminal matter but a disciplinary matter. The ground of the decision in *Ex parte Pitt* (1) was that the proceedings were in the nature of a criminal information. There is a great difference between a disciplinary matter and a criminal matter. Sect. 8 of the Solicitors Act, 1932, gives an appeal from an order made by the Committee to the High Court at the instance either of the applicant or of the solicitor. The Rules which have been made governing such appeals provide that the appeal shall be brought to the King's Bench Division, that it shall be by notice of motion, and that every appeal shall be by way of rehearing. Under s. 5, sub-s. 1, of the Act of 1932 any application by a person other than a solicitor to require a solicitor to answer allegations contained in an affidavit must be made to and heard by the Disciplinary Committee of the Law Society, and under sub-s. 2 the Committee on the hearing of any such application have power to make any such order as they may think fit. Therefore the former jurisdiction of the Divisional Court with regard to making orders affecting solicitors has been transferred to the Disciplinary Committee, and, if the decision of the Divisional Court is correct, an applicant must be represented by counsel on the hearing of the application by the Disciplinary Committee. It was held by a full Court of Appeal in *In re E. F. Hardwick* (2) that when the High Court makes an order ordering a solicitor to be struck off the roll for misconduct, it does so in exercise of a disciplinary jurisdiction over its own officers and not of a jurisdiction in any criminal cause or matter. When s. 8 of the Act of 1932 gave a right of appeal to an applicant, it must have given a right of appeal against the acquittal of the solicitor on the charges made against him. The change of procedure brought about by the Solicitors Acts of 1919 and 1932 is a fundamental change and the former decisions no longer apply. Although an appeal from an order made by the Committee is in form by notice of motion, it is in substance an appeal and therefore it is essential that the applicant should be entitled to appear in person. Sect. 9 of the Act of 1932 preserved the right of an applicant to make an application to the High Court supported by affidavits. Ex debito justitiae the applicant was entitled to be heard in person before the Divisional Court.

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(1) 2 Dowl. 439.

(2) (1883) 12 Q. B. D. 148.

W. M. Andrew for the Law Society as Registrar of Solicitors. Solicitors are officers of the Court and the Master of the Rolls and any judge of the High Court has power under the proviso to s. 5 of the Act of 1932 to deal with a solicitor for misconduct. Prior to 1888 a master of the High Court made a report with respect to any allegations against a solicitor contained in an affidavit. Under the Solicitors Act, 1888, a change was made in the procedure, and a Committee of the Law Society heard the application and considered the allegations and made a report thereon to the High Court and the Court made such order thereon as the Court thought fit. In 1919 power was given to the Committee of the Law Society to make such orders as they might think fit, with regard to striking the name of the solicitor off the roll, or suspending him from practice. It is clear from the authorities that the Courts will protect their own officers against frivolous applications to strike them off the roll, and it is immaterial whether such applications are made by motion or by way of appeal. If a person went to the Court by notice of motion he would have to be represented by counsel, and it would be very anomalous if he were allowed to go by way of appeal in person. Sect. 8 of the Solicitors Act, 1932, gave a right of appeal against an order made by the Committee both to the applicant and to the solicitor to whom the application relates. There was no doubt but that a solicitor who had been found guilty of misconduct could appeal in person. But, if the finding of the Committee was that there was no professional misconduct, it was extremely doubtful whether the applicant had any right of appeal. The Divisional Court had held in *In re A Solicitor* (1) that the words of s. 8 of the Solicitors Act, 1932, giving a right of appeal to the applicant were not so definite as to over ride the long established principle that there could be no appeal against an acquittal. That case was decided on the authority of *Reg.* v. *Keepers of the Peace and Justices of the County of London.* (1) There was clearly an acquittal in the present case. An affidavit was sworn by the applicant containing charges against the two solicitors, and the Committee held that no prima facie case had been made out. The same principles that apply in the case of an appeal from a decision of magistrates apply also in the case of an appeal from a decision of the Disciplinary Committee in favour of the solicitor. The Divisional Court dismissed the appeal because there was no one before the Court whom they could hear.

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(1) [1934] 2 K. B. 463.

Maurice Share in reply. The decision of the Divisional Court in *In re A Solicitor* (2) proceeded upon two grounds. First, that there was in that case no order of the Committee and that under the Act of 1932 there could be no appeal from anything except an order—in the present case it was admitted there was an order—and secondly, that it was in the nature of a criminal proceeding as the solicitor was being charged with an offence, and that there could be no appeal against an acquittal as the person charged could not be vexed again for the same offence. That decision went in the face of the Act of 1932, which by s. 8 expressly gave a right of appeal to the applicant, who could only wish to appeal against a finding that the allegations against the solicitor were not made out. All the judges cited *Reg.* v. *Keepers of the Peace and Justices of the County of London* (1), a case of obstruction to a highway which was purely a criminal matter. But it was held in *In re E. F. Hardwick* (3) that the jurisdiction exercised by the Court over a solicitor was in a disciplinary matter and not in a criminal matter.

Cur. adv. vult.

1937. Nov. 22. The following judgments were read :—

GREER L.J. On October 14, 1936, the appellant, Marion

(1) (1890) 25 Q. B. D. 357.
(2) [1934] 2 K. B. 463.
(3) 12 Q. B. D. 148.

Marshall, made an application in writing to the Disciplinary Committee of the Law Society constituted under the Solicitors Act, 1932. The Court was not provided with a copy of this application, but as no objection was taken by the Committee, or the Divisional Court, that the application was not in the form in which, according to r. 4 of the Rules, made in pursuance of the powers given to the Committee by the provisions of s. 6, sub-s. 1, of the Solicitors Act, 1932, it should have been, we are entitled to assume that the application was in the form required by the Rules and the schedule thereto. On October 17, 1936, the applicant swore an affidavit purporting to support her application, and sent it to the Committee. On November 5 the Committee met and, in the absence of the appellant and the two solicitors concerned, made an order dismissing the application without requiring the two solicitors to answer the application. In my judgment the Committee were wrong in making this order without giving the appellant an opportunity of contending, whether by herself or by counsel, that she had made out a prima facia case against the solicitors. Under r. 2 of the rules under s. 6, sub-s. 1, it is provided: "Before fixing a day for the hearing the Committee may "require the applicant to supply such further information and "documents relating to the allegations as they think fit, and "in any case where, in the opinion of the Committee, no "prima facie case is shown the Committee may, without requir-"ing the solicitor to answer the allegations, dismiss the "application. If required so to do, either by the applicant "or the solicitor, the Committee shall make a formal order "dismissing such application." That rule seems to me to involve that both the applicant and the solicitor should be present at the hearing of the application as to whether a prima facie case had been made out, because neither of them could ask for a formal order to be made dismissing the application if they were not present when the application was made. On the question whether she had made out a prima facie case, the appellant was entitled to be heard. In my judgment the Committee, in making the order they made on November 5, without hearing the appellant, were acting in a manner

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inconsistent with natural justice, which requires that no judgment or order affecting the position or rights of an applicant for a decision, in which the applicant is interested, should be made without giving such applicant an opportunity of being heard in support of the application. I do not think that the Regulations or the Rules justify what the Committee did, and if there be a regulation or rule which purports to do so, it would, in my judgment, be ultra vires. After the order of November 5, by notice of motion the appellant appealed to the Divisional Court of the King's Bench Division, as she was, in my opinion, entitled to do by s. 8 of the Solicitors Act, 1932. Her notice of appeal reads as follows: "Take notice that this Honourable "Court will be moved upon the expiration of fourteen days "from the service upon you of this notice or so soon thereafter "as the appellant may be heard by way of appeal from the "order of the Disciplinary Committee constituted under the "Solicitors Act, 1932, dated the 5th day of November, 1936, "for an Order that the above two solicitors shall be required "to answer the allegations contained in the affidavit of October "17th, 1936, accompanying the application to the Disciplinary "Committee and for an order that the Disciplinary Committee "shall hear and determine these allegations or that such "other order shall be made as the Court shall think fit for the "determination of these allegations. And further take notice "that the grounds of this appeal are: that it appears that in "the matter referred to in the above mentioned affidavit "that the two solicitors have acted in a way that is not in "accordance with the definition of proper conduct and further "it appears that they have on the occasions referred to in the "same affidavit intentionally misled and also deceived the Court. "And, further, it is held that only by a full hearing of the "facts and the full evidence in the matter of the affidavit "can a determination be come to." It will be observed that she did not appeal on the ground that she had not been heard by the Committee on the question whether a prima facie case had been made by her affidavit, and in my judgment, without an amendment of her notice of appeal to the Divisional Court she would not have been entitled to raise this question. Her ground of appeal, as stated in her notice, was that on the statements contained in her affidavit the Committee should have made an order calling on the two solicitors to answer the allegations of misconduct contained in the affidavit.

On February 2, 1937, after several adjournments, the Divisional Court made an order in the words following: "Upon "reading the notice of appeal herein. Upon hearing Mr. "Andrew of counsel for the respondent, the Registrar of "Solicitors, Marion Marshall the appellant not being represented "by counsel, it is ordered that the appeal of Marion Marshall "from the order of the Disciplinary Committee constituted "under the Solicitors Act, 1932, dated the 5th day of November, "1936, for an order that the above two solicitors should be "required to answer the allegations contained in the affidavit "of October 17th, 1936, accompanying the application to the "Disciplinary Committee and for an order that the Disciplinary "Committee should hear and determine these allegations "be dismissed with costs to be paid by the said appellant "Marion Marshall to the said Registrar of Solicitors or "his solicitor such costs to be taxed by a Taxing Master. "And it is further ordered that the said appellant's "application for leave to appeal to His Majesty's Court of "Appeal be dismissed."

It was stated by the appellant's counsel, and admitted by counsel for the Law Society, that the order was made solely on the ground that the Court were not entitled to hear the appellant in person, and that she could only be heard in the appeal if it was supported by counsel. In my judgment, they were wrong in so holding, but we are, I think, entitled to dismiss this appeal on the ground that, if they had heard the appellant and read her affidavit, they would have been bound to dismiss the appeal. A respondent is entitled to support a judgment on any sufficient ground, whether or not it be the ground on which the Court below decided the matter. The appellant's affidavit, which was before the Committee, is to a large extent unintelligible, and such charges as may on a careful analysis appear to be made by it against the two solicitors are absurd and without any foundation in the facts stated in the affidavit. The Committee were, in my judgment, justified in holding that no prima facie case had been made out for calling on the two solicitors to answer the charges of misconduct, if any, that were contained in the affidavit, though as I have said, they ought to have heard the appellant before making the order of November 5. If they had heard her, they would have been bound to dismiss her application, as she could not have supported her application on any grounds other than those stated in her affidavit. For these reasons I think the order of the Divisional Court was right, though they ought to have heard her argument, notwithstanding the fact that she had not instructed a barrister to appear for her.

The question whether an appellant from an order made by the Committee can be refused a hearing, if she does not appear by counsel, is a difficult question to answer. Sect. 8 of the Solicitors Act, 1932, reproduces a similar provision in a statute of 1919. Before that Act became law the Committee had no power to make any order against a solicitor with reference to charges of misconduct. The Committee had to report to the High Court. On considering the report, it lay with the Court to decide whether any order should be made against the solicitor concerned, and, if so, to make such order as the Court deemed right. On such an application it had been decided that the complainant could not be heard in person, but could only be heard by some member of the bar briefed by the complainant. This was finally determined by a Divisional Court in *In re a Solicitor. Ex parte Incorporated Law Society* (1), following the decision of Lord Denman in *Ex parte Pitt.* (2) The head-note reads as follows: "Sect. 13 of the Solicitors "Act, 1888, by which an application to strike the name of a "solicitor off the rolls, or to require him to answer allegations "contained in an affidavit, is to be heard by a committee of "the Incorporated Law Society, who are to embody their "finding in a report to the High Court, provides that any "person who but for the Act would have been entitled to apply "to the Court to strike a solicitor off the rolls, or to require "him to answer allegations, shall still be entitled so to apply,

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(1) [1903] 1 K. B. 857.

(2) 2 Dowl. 439.

"'and shall be entitled to be heard if the Society brings the "'report of the committee before the Court.' *Held*, that such "an applicant could not be heard in person, but must appear "by counsel." In giving judgment the Lord Chief Justice, Lord Alverstone, used these words (1): "It has been for many "years the practice where applications are made against "solicitors to require that they shall be conducted by counsel. "The Act of 1888 only provides a modified, improved, and "amended procedure, whereby the report of the statutory "committee is brought before the Court, and action is taken "thereon," and "According to the old practice there were two "applications which might be made against a solicitor—one "to strike him off the rolls, and the other to call upon him to "answer the matters contained in an affidavit. The Court "was dealing, therefore, in that case with the less serious form "of application. The application was made to four judges, "and Lord Denman, after consulting the other judges and the "Master of the Crown Office, said this: 'The motion against "'an attorney being in the nature of a criminal information, "'the Court requires that it should be made by a gentleman "'at the bar; and it cannot be made in person. Otherwise "'we have not the sanction of a barrister for the propriety "'of such an application'"; and Wills J. said (2): "I entirely "agree. I have had a very considerable experience in cases "of this kind, as for a long period when at the bar I represented "the Law Society, and, during the fifty years and rather more "that I have been in the profession, I have never known a "case in which an application of this kind was heard either before "or since the Act of 1888 in which the matter was not conducted "by counsel." I think we cannot now over-rule a practice that has been followed ever since the decision of *Ex parte Pitt.* (2) But we are entitled to hold that the rule has no application to the hearing of an appeal from an order made by the Disciplinary Committee. Where there is an appeal from any order the appellant is, in my judgment, entitled to support the appeal in person. This is a fundamental rule of justice

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(1) [1903] 1 K. B. 859.
(2) [1903] 1 K. B. 860.
(3) 2 Dowl. 439.

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which, in my judgment, applies to all appeals, including an appeal from an order made by the Disciplinary Committee of the Law Society, but inasmuch as the Divisional Court, if they had heard the appellant, would of necessity have made an order dismissing the appeal for the reasons above stated, I think this appeal should be dismissed with costs.

Having regard to the decision above indicated, that the Divisional Court were wrong in refusing to hear the appellant, it seems necessary to decide what this Court should do, that is to say, whether it should send the case back to the Divisional Court for a re-hearing, or whether it should give judgment dismissing the appeal. It seems to me that, quite apart from their refusal to hear the appellant, the Divisional Court had good grounds for dismissing the appeal, first, because the two solicitors in question had not been served with the notice of appeal and were not present at the hearing ; and secondly, because even if they had been present, the Court would have been bound to dismiss the appeal on the ground that nobody could by any possibility say that the materials contained in the appellant's affidavit were sufficient to establish a prima facie case.

SCOTT L.J. In this case the appellant was a person who had had litigation, and in connection with it had several times changed her solicitors, and in the end was dissatisfied with the result of the legal proceedings in which she was concerned. What the merits of those proceedings were is irrelevant to the present question. As a result of them she made a long affidavit on October 17, 1936, complaining against two solicitors, for the purpose of complaining against them before the Disciplinary Committee of the Law Society. This affidavit was duly submitted through the Registrar of the Law Society to the Committee who, on November 5, 1936, without hearing the complainant, issued a document entitled "Findings and "Order," reciting the application and its perusal and that the Committee were of opinion that no prima facie case was shewn against the said two solicitors, and ordering that the application be dismissed, without requiring the said two solicitors to answer the said allegations. This was signed by Sir Roger Gregory, the chairman of the Committee, and duly transmitted to the complainant by the Registrar. The procedure adopted by the Committee was in accordance with the provisions of r. 2 of the Rules made by the Committee, with the concurrence of the Master of the Rolls, on July 28, 1932, in purported pursuance of s. 6 of the Solicitors Act, 1932. That Rule is as follows: "Before fixing a day for the hearing the Committee "may require the applicant to supply such further information "and documents relating to the allegations as they think fit, "and in any case where, in the opinion of the Committee, no "prima facie case is shown the Committee may, without "requiring the solicitor to answer the allegations, dismiss the "application. If required so to do, either by the applicant "or the solicitor, the Committee shall make a formal order "dismissing such application." The terms of this rule purport to confer on the Committee, acting on its own initiative, a power similar to that conferred by Order xxv., r. 4, of the Rules of the Supreme Court upon the Court or a judge upon an application by the defendant to dismiss an action on the ground that no reasonable cause of action is disclosed. Rule 3 provides that in a case in which, in the opinion of the Committee, a prima facie case is shown, the Committee shall fix a day for hearing; and appropriate provisions are contained in that and the next two rules for the conduct of the proceedings in a manner calculated to give the necessary information and opportunities of establishing their case to both parties to the dispute. These further rules cause me to interpret r. 2 differently to Greer L.J. I think they make it clear that r. 2 really does authorize the Committee in their discretion to dispense with any hearing at all, and without hearing even the applicant to dismiss the application merely upon the internal evidence of the affidavit of complaint: and that is what the Committee did in the present case. But such a rule is in my opinion ultra vires, as the Act requires a hearing: and I think on that ground that the Committee's action was wrong; they only had power to dismiss *after hearing the applicant*, as required by the Statute, and not otherwise.

The complainant was dissatisfied with the action taken by the Committee and thereupon, availing herself of s. 8 of the Act of 1932, gave notice of appeal to the Divisional Court, asking for an order that the solicitors should be required to answer the allegations contained in the affidavit, and that the Disciplinary Committee should hear and determine the allegations, or that the Court should make such other order as it might think fit for the determination of the allegations. The grounds of appeal alleged were that the affidavit disclosed improper conduct by the solicitors, and that a full hearing was necessary before a determination could properly be reached. This notice of appeal was served on the Registrar of the Law Society but not personally on the two solicitors. When the appeal came on before the Divisional Court, counsel who was instructed to prosecute the appeal on behalf of the appellant was ill, both on the first and on three other occasions; and the Court on the fourth occasion (February 2, 1937) refused to grant any further adjournment for counsel. The appellant then asked to be heard in person, but the Court, as we were informed by Mr. Share, who appeared for her before us, refused to hear her, and also refused leave to appeal. The Court of Appeal, however, subsequently gave leave to appeal, and extended the time for appealing.

On the hearing before us it was contended on her behalf (1.) that s. 8 of the Act gave her an absolute right of appeal, and (2.) that she was entitled, as a litigant party, to be heard in person in the Divisional Court, as she asked to be in the absence of her counsel.

The merits of the allegations contained in the affidavit were not discussed before us; although having read it I am not surprised that the Disciplinary Committee took the view that there was no intelligible case put forward by the applicant which it was right to call upon the two solicitors to answer. Strictly speaking, that question is not before us now, as we have only to deal with the above questions of law; but I will return to it later.

The only parties to the appeal appearing before us were the applicant and the Registrar of the Law Society, who was represented by counsel on the appeal as respondent. There was no other respondent, for as in the Court below neither of the two solicitors had been served with notice of appeal. This omission was, as has been pointed out by Greer L.J., fatal to both appeals, and on that ground this appeal must be dismissed.

It is not without hesitation that I say anything more, but questions of principle have been discussed, and the discussion seems to me to indicate danger of misconception on certain matters of practical importance in the working of this part of the Solicitors Act, so I venture to deal with the chief points.

On the question of the appellant's right of audience as a litigant in person, we were informed that the Divisional Court expressed the view that they must follow the decision in the case of *In re A Solicitor. Ex parte Incorporated Law Society* (1), which was affirmed by the Court of Appeal. (2) In that case both Courts held that upon consideration by the Court of a report from the Statutory Committee of the Law Society, pursuant to s. 13 of the Solicitors Act, 1888, now repealed, it was a settled rule of the Court that an applicant must appear by counsel, following the old practice in the case of applications to the Court direct at a time before the Committee of the Law Society had been created by statute. Had the decision in the Court of Appeal in that case been applicable to the question before us in the present case, we should have been bound to follow it; but in my view the position of the Court on consideration of a report from the Law Society under the Act of 1888 was different to the position of the Court on an appeal from the Disciplinary Committee under the present statutory system, which was first introduced by s. 5 of the Solicitors Act of 1919. That Act abolished the report procedure, substituted the Disciplinary Committee for the Court, and made it a court of first instance with power and duty to inquire into and decide allegations against solicitors, and generally to exercise the disciplinary jurisdiction previously exercised by the Court itself. Sect. 5 said that the Committee should

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(1) [1903] 1 K. B. 857. (2) [1903] 2 K. B. 205.

"upon every such application have power, after hearing the "case, to make any such order as to striking off the Roll . . . . "as before the commencement of this Act the Court or the Master "of the Rolls (as the case may be) would have had power to "make upon a report of the Committee made to the Court or the "Master of the Rolls pursuant to the provisions of section "thirteen of the principal Act." Sect. 8 of the Act of 1919 was in the following terms: "An appeal to the Court from "any order of the Committee made under the powers of this "Act shall lie at the instance either of the applicant or of the "solicitor, and every such appeal shall be made within such "time and in such form and shall be heard in such manner as "shall be prescribed by rules in that behalf to be made under "the authority of this Act." Sects. 5 and 8 of the present Act are, apart from differences of language which, so far as the present question is concerned, are immaterial, identical with ss. 5 and 8 of the Act of 1919. The change of substantive jurisdiction from a mere report by the Statutory Committee and an order by the High Court upon it, to an original order by the Disciplinary Committee as a domestic Court acting in place of the High Court with an appeal to the High Court, has created a new position. To-day every person appealing to the High Court in exercise of his statutory right is a party to the appeal, and as such presumably possesses all the natural rights recognised by our system of justice as belonging to every party to litigation—whether in first instance or on appeal, including the right, if so advised, to appear in person and to argue his or her own case. No one can doubt that before the Committee an applicant is entitled to be heard in person; and when exercising the right of appeal under s. 8 the applicant is, in my opinion, in exactly the same position as any other appellant from an order of a court of first instance. If so, he is free to avail himself of the ordinary English right of every appellant, if he so chooses, to appear in person to argue his own case. It is not as a rule in the interest of the layman to take that course, nor is it helpful to the Court; but it is an essential element in the liberty of the subject that he may come for redress to the King's Court in person. For these reasons I think that the Divisional Court was wrong in refusing audience to the applicant. Even assuming that she had made an election to be represented by counsel, I think she was entitled when counsel failed her to change her mind and argue her own case.

But another question was raised before us which is of much more importance. Mr. Andrew on behalf of the Law Society referred us to the case of *In re A Solicitor* (1), a decision of the Divisional Court, consisting of Lord Hewart C.J., Avory and Swift JJ., as a reason for dismissing the appeal. In that case the Committee had promulgated their decision in terms which ended with the words "while not finding any "professional misconduct the Committee make no order as to "costs." The complainant, who was acting on behalf of the Law Society, appealed; the respondent took a preliminary objection that there had been no order and that no appeal lay except from an order, and the Court upheld the objection. In the present case there was an order, dismissing the application, and the first point taken in the 1934 case does not arise. But in that case the Court went on to hold that even if the refusal to find professional misconduct did amount to an order dismissing the complaint, the wording of s. 8 of the Act of 1932 conferring the right of appeal was not so definite as to over ride the long established principle that there can be no appeal against an acquittal on a criminal charge. As an illustration of the principle they relied on *Reg.* v. *Keepers of the Peace and Justices of the County of London* (2), a highway case in which the Court applied it to the dismissal of a summons for obstructing: see per Wills J. (3): "I think this is distinctly "a criminal matter within the decisions of the Court of Appeal, "refusing appeals in cases stated by justices." In the present case the Disciplinary Committee purported to be acting, as I have already said, under r. 2 of the Solicitors Act (Disciplinary) Rules of 1932 made under s. 6, sub-s. 1, of the Solicitors Act, 1932, which authorises the dismissal of a complaint without a hearing, and I doubt whether a summary

(1) [1934] 2 K. B. 463.
(2) 25 Q. B. D. 357.
(3) 25 Q. B. D. 361.

dismissal of an application without a hearing comes within the principle of the above decision of the Divisional Court in 1934; but in any event I feel bound to say that as at present advised and without further argument I am not prepared to concur in that decision. It seems to me to give to the domestic tribunal a final and exclusive jurisdiction, which was not intended by the Act. I think s. 8 was intended to preserve an ultimate final jurisdiction of the High Court over its own officers in all cases.

I agree that the appeal must be dismissed, but the dismissal will not in my judgment prejudice the right of the appellant again to make an application to the Disciplinary Committee of the Law Society, if she be so advised, although as I have already indicated I cannot see any sufficient grounds of complaint in the affidavit she made.

LUXMOORE J. [stated the facts set out above and continued :] At the hearing in this Court counsel for the applicant in substance confined his argument to the question whether the applicant was entitled to present her case to the Divisional Court in person and urged that that Court was wrong in refusing to allow her so to do. He asked that the order of the Divisional Court might be set aside and that the matter should be remitted to that Court with directions to hear the motion on its merits.

It seems to me, however, that two preliminary questions arise, the first is whether the Disciplinary Committee on November 5, 1936, made an order from which an appeal lies, and the second is, assuming that an appeal lies, is it competent to the applicant to ask for any variation of the order without making the two solicitors parties to the appeal?

To answer these questions it is necessary to consider the material provisions of the Solicitors Act, 1932, under which the application was made and the rules relating to any such application.

Sect. 5, sub-s. 1, of the Act provides that any application by another person to require a solicitor to answer allegations contained in an affidavit shall be made to and heard by the

Disciplinary Committee of the Law Society constituted under s. 4 of the Act in accordance with rules made under s. 6 of the Act.

Sect. 6 provides that the Disciplinary Committee, with the concurrence of the Master of the Rolls, may from time to time make rules for regulating the making, hearing, and determining of applications to the Committee under this part of the Act.

The rules made with the concurrence of the Master of the Rolls under s. 6 are dated July 28, 1932. The material provisions of these rules are as follows :—

Rule 1 : "An application to the Committee . . . . to "require a solicitor to answer allegations contained in an "affidavit shall be in writing under the hand of the applicant "in the form set out in the Schedule, and shall be sent to the "Clerk to the Committee, together with an affidavit by the "applicant, stating the matters of fact on which he relies in "support of his application."

Rule 2 : "Before fixing a day for the hearing the Committee "may require the applicant to supply such further information "and documents relating to the allegations as they think fit, "and in any case where, in the opinion of the Committee, no "prima facie case is shown the Committee may, without "requiring the solicitor to answer the allegations, dismiss the "application. If required so to do, either by the applicant or "the solicitor, the Committee shall make a formal order dismissing such application."

Rule 3 : "In any case in which, in the opinion of the Com"mittee, a prima facie case is shown the Committee shall fix a "day for hearing, and the Clerk to the Committee shall serve "notice thereof on the applicant and on the solicitor, and shall "serve on the solicitor a copy of the application and affidavit."

Rules 2 and 3 appear to me to contemplate that the Disciplinary Committee shall first consider whether a prima facie case is disclosed by the information and documents relating to a particular application before any date for hearing the application is fixed, and it is only if the Committee are satisfied that a prima facie case is disclosed that the application is to be allowed to proceed to hearing. This procedure does not appear to me

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to be in accordance with the provisions of s. 5 of the Act of 1932 and in my judgment r. 2 is ultra vires in so far as it provides for the making of an order dismissing an application under the Act without any hearing.

By sub-s. 2 of s. 5 it is provided that on the hearing of an application under sub-s. 1 (*b*) of the same section the Disciplinary Committee has power to make any such order as to removing from or striking off the roll the name of the solicitor to whom the application relates, as to suspending him from practice, as to payment by any party of costs, and otherwise in relation to the case as they may think fit.

This power is in terms directed to what is to be done " on "the hearing." It seems to me that a refusal to hear is outside the scope of this section.

Sect. 8 of the Act gives a right of appeal against any order made by the Disciplinary Committee under s. 5. It is in these terms: " An appeal against any order made by the "Committee under this part of this Act " (which includes s. 5) "shall lie to the High Court at the instance either of the "applicant or of the solicitor to whom the application relates, "and every such appeal shall be made within such time and "in such form and shall be heard in such manner as may be "prescribed by rules made from time to time " as therein provided.

The rules made under this section include a provision (see r. 5) that copies of the order appealed from prefaced by a statement of the findings of the Committee, and a copy of the notes of evidence taken on the hearing, and of any affidavits used thereon shall be furnished. It seems to me to be plain that both the Act and the rules contemplate that the order in respect of which the right of appeal is granted shall be an order made " on the hearing." An order made in the absence of the parties on a preliminary consideration by the Committee of the question whether there is a prima facie case sufficient to justify a hearing, is not in my judgment "an order made on a hearing." It is a refusal to hear and consequently there is no order from which the applicant is entitled to appeal under the provisions of s. 8 of the Act.

In my judgment the applicant's remedy, if any, is in respect of the refusal to hear and is consequently the subject-matter of mandamus and not of an appeal. The second question, therefore, does not arise, but if I had come to a contrary conclusion with regard to the answer to the first question I am of opinion that it would not be competent for the Divisional Court or this Court to consider the appeal in the absence of the two solicitors and that in that view of the case this appeal would have been defective for want of parties.

It is to be observed that neither the Divisional Court nor this Court could make an order in the form sought by the notice of motion either by requiring the solicitors to answer the allegations made by the applicant against them or directing the Disciplinary Committee to hear and determine whether the allegations are well founded. The only relief which the applicant could obtain would be a direction to the Disciplinary Committee to fix a hearing and to hear her application. This relief was not sought in the proceedings before the Divisional Court nor in those in this Court.

This effectively disposes of the case. Practically the whole of the argument proceeded on the assumption that the appeal was competent and was directed to the question whether on an appeal under s. 8 a complainant against a solicitor can appear in person or must invariably appear by counsel. This point is of importance and as it was fully argued in this Court I think it right to deal with it. The Divisional Court decided against the appellant's right to appear in person on the authority of certain decisions under earlier Acts relating to solicitors. The latest of these decisions is *In re A Solicitor.* (1) The case came first before the Divisional Court and was subsequently heard in the Court of Appeal. Both Courts decided that in proceedings under s. 13 of the Solicitors Act, 1888, the applicant who instigated them could only be heard by counsel when the report of the Disciplinary Committee was brought before the Court. In so deciding each Court followed an earlier decision in *Ex parte Pitt.* (2) Counsel on behalf of the appellant in the present case argued that these

(1) [1903] 1 K. B. 857; [1903] 2 K. B. 205. (2) 2 Dowl. 439.

decisions have no application to an appeal under s. 8 of the Act of 1932.

Under the Act of 1888 the function of the Statutory Committee was to hear the complaint and report to the Court when the Court dealt with the complaint in the light of the report and after argument on behalf of the persons interested, that is, the complainant and the solicitor concerned.

Under the Act of 1932 the Disciplinary Committee hear the complaint and determine it after hearing the parties to it. Both the applicant and the solicitor are given in express terms the right of appeal to the High Court from the Disciplinary Committee's order. There is no limitation on this right and therefore it carries with it the right which is enjoyed by every person entitled to appeal to this Court to appear either by counsel or in person. I am therefore of opinion that if, contrary to the opinion I have already expressed, the appeal to the Divisional Court had been competent, the refusal of that Court to hear the appellant in person would have been contrary to the provisions of s. 8 of the Act of 1932. But, as I have already stated, the applicant has not in my judgment any right of appeal in the circumstances of this case, and further, if, contrary to my opinion, she had such right, the present appeal is defective for want of parties. Consequently I am of opinion that this appeal must be dismissed and the appellant ordered to pay the costs of the respondent the Registrar of Solicitors. It is, I think, right to add that I have read the applicant's affidavit sworn in support of her application against the two solicitors. I agree that it seems impossible to extract from it any case which the two solicitors could properly be required to answer, but in my opinion it cannot be held that the Disciplinary Committee are entitled to refuse to fix a hearing on this ground.

Appeal dismissed.

Solicitors for appellant: *Gassman & Gassman.*
Solicitor for respondent: *Sir Edmund R. Cook.*

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County court—Costs—Remitted action—Judgment for plaintiff with costs—No special direction by county court judge as to costs—Taxation by Registrar of costs down to remission on High Court scale and thereafter on column C of county court scales—Appeal to county court judge—Discretionary power of taxation—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 47, *sub-ss.* 3, 4; *s.* 73 *proviso.*

An action founded on tort was remitted without any special order as to costs by the High Court to the county court under s. 46 of the County Courts Act, 1934, and judgment for the plaintiff was given by the county court for 60*l.* and costs. In the minute of the judgment as recorded no special direction appeared as to costs and the registrar proceeded to tax the costs on the High Court scale down to the date of remission and thereafter on column C of the county court scales. Thereupon the defendant applied to the judge to amend the judgment by making the whole of the costs taxable on column C. This application was successful.

On appeal by the plaintiff against the order of the county court judge directing the minute to be so amended:—

Held, that where in the opinion of the county court judge the action is one which ought properly to have been commenced in the county court it is within his discretion to direct that the whole of the costs (both High Court costs before remitter and county court costs subsequently) should be taxed on the appropriate county court scale.

Held, therefore, in the present case, that the whole of the costs were properly taxed on column C of the county court scales, and the Court would not interfere with the exercise of the discretion.

Jenkins & Co. v. *Simon* [1926] 1 K. B. 111 distinguished.

Appeal from a decision of Judge Ruegg in the Birmingham County Court directing the whole of the costs of a remitted action to be taxed on the county court scale.

The facts as stated by the Master of the Rolls were as follows: The action was remitted to the county court under s. 46 of the County Courts Act, 1934; and on April 20, 1937, judgment for the plaintiff was given in the county court for 60*l.* and costs. In the minute of the judgment as recorded no special direction appeared as to costs and the registrar proceeded to tax the costs on the High Court scale down to the date of remission, and thereafter on column C of the county court scales. Thereupon the defendant on May 3, 1937, applied to the judge to amend the minute of the judgment by making the whole of the costs taxable on column C. This application was successful. The plaintiff appealed against the order directing the minute to be so amended.

The appeal was heard on November 25 and 26, 1937.

Colin Coley for the appellant. The action was founded in tort and the plaintiff has recovered 60*l.* and costs in the county court. It is submitted that he is therefore entitled to have his costs taxed on the High Court scale down to the date of the remitter and on the C scale of the county court scale thereafter.

The discretion given to the county court judge by s. 73 of the County Courts Act, 1934, must be judicially exercised, and a successful plaintiff cannot be deprived of High Court costs, wholly or in part, or of that part of the proceedings which takes place in the High Court, if he brings himself within the provisions of s. 47 entitling him to High Court costs and there has been no misconduct on his part. It is not a judicial exercise of the discretion to deprive him of costs merely because the judge thinks that the proceedings ought to have been commenced in the county court: *Jenkins* v. *Simon.* (1)

Sect. 47 now applies wherever the action is tried.

[SIR WILFRID GREENE M.R.: The only cases in which the judge can deprive a successful plaintiff of his costs are those mentioned in s. 47 of the Act. Here the judge has given no reasons for his decision. How can it be said that he has exercised his discretion wrongly?]

P. B. Morle for the respondent. The general principle is that where an action can be properly brought in the county court it should be brought there, and the onus is on the plaintiff if he brings it in the High Court to show that he was justified in so doing. *Jenkins & Co.* v. *Simon* (1) has no application to the facts of the present case. The plaintiff there had a vested right to his costs. Before the County Courts Act, 1934, costs followed the event. Now they do not do so, but are in every

(1) [1926] 1 K. B. 111.

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case in the discretion of the judge. Sect. 47 contemplates proceedings beginning and ending in the High Court.

Here the judge was dealing with a case which might have been commenced in the county court. He was entitled to consider all the circumstances of the case and, if he thought the plaintiff had chosen the more expensive proceedings, it was open to him to reflect it in his order as to costs.

Here it is submitted the appellant has failed to show that the judge has exercised his discretion on a wrong principle. [He also referred to *Donald Campbell* v. *Pollak*. (1)]

Colin Coley replied.

Cur. adv. vult.

1937. Dec. 8. The following judgment of the Court (Sir Wilfrid Greene M.R., Romer and MacKinnon L.JJ.) was read by Sir Wilfrid Greene M.R.

This appeal raises a question of importance with regard to the costs of actions remitted from the High Court to the county court.

[His Lordship stated the facts as above set out and continued :] It was first argued that the minute as recorded correctly embodied the order as to costs made on April 20 ; and that the judge had no power to vary that order. There is no written note of the judgment as delivered ; and there was a difference of recollection on the part of counsel and solicitors as to what took place. We decided that as the learned county court judge ought to be treated as having acted within his jurisdiction under the "slip" Order (Order XV., r. 12), unless the contrary could be established, the statement as to what took place made by the respondent's counsel ought to be accepted by us. That statement was to the effect that the judge had directed the whole of the costs of the action to be taxed on column C. Counsel for the appellant did not feel able in the circumstances to dispute the correctness of this decision ; and the appeal was accordingly treated as an appeal from the original order as to costs made on April 20.

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(1) [1927] A. C. 732.

When the order was made in the High Court remitting the action, no special order was made as to the costs of the action down to the date of remission. Accordingly the costs of the whole proceedings, both before and after the order of remission, were in the discretion of the county court judge, subject to the provisions of s. 73 of the County Courts Act, 1934. The question raised by the appeal is whether the county court judge had a discretionary power to give costs down to the date of remission on any scale except the High Court scale. It was admitted that, if he had such a discretionary power, there were no circumstances entitling this Court to interfere with its exercise.

Sect. 73 provides as follows: "Where an action, counter-"claim or matter is ordered to be transferred—(*a*) from the "High Court to a county court; or (*b*) from a county court "to the High Court; or (*c*) from one county court to another "county court; the costs of the whole proceedings both "before and after the transfer shall, subject to any order "made by the court which ordered the transfer, be in the "discretion of the court to which the proceedings are trans-"ferred, and that court shall have power to make orders with "respect thereto and as to the scales or columns on or under "which the costs of the several parts of the proceedings are "to be taxed, and the costs of the whole proceedings shall "be taxed in that court: Provided that, as regards so much "of the proceedings in any action transferred from the High "Court to a county court as take place in the High Court "before the transfer (i.) the costs thereof shall be subject to "the provisions of section forty-seven of this Act; and "(ii.) the powers of the High Court or judge thereof under "sub-section (3.) of that section to make an order allowing "costs on the High Court scale, or on or under any county "court scale or column, shall, subject to any order of the "High Court or the judge by whom the transfer was ordered, "be exercisable by the judge of the county court."

The first part of this section, as a matter of language, gives to the county court judge complete discretion as to all the costs. He may make orders "as to the scales or columns "on or under which the costs of the several parts of the "proceedings are to be taxed." This language, upon the face of it, suggests that the county court judge has a discretionary power to direct that all the costs be taxed on one or other of the county court scales or columns. But it is said that para. (i.) of the proviso modifies this, and limits the powers of the county court judge. This paragraph provides that the costs of the proceedings before remission are to be subject to the provisions of s. 47 of the Act. It is accordingly necessary to refer to that section which deals with the costs in the High Court of an action which could have been commenced in the county court, but is in fact both commenced and concluded in the High Court. The section compels the Court, in such an action where the amount recovered falls within the limits there specified, either to deprive the plaintiff of all costs or to allow him county court costs only, as the case may be. The upward limit, in the case of actions founded on tort (as was the present action) is 50*l.* The rigour of this provision is modified in special cases by sub-s. 3 and also by sub-s. 4, which, in regard to the cases there mentioned where the plaintiff recovers 20*l.* or upwards (e.g., where the defendant has paid money into Court or where judgment has been obtained in default of appearance or defence) provides that the plaintiff shall, unless otherwise ordered, "be entitled "to costs on such scale as may be prescribed by the Rules of "the Supreme Court."

Now it is said on behalf of the appellant that this section, by laying down precisely the cases in which the High Court is to allow no costs or only county court costs, by implication means or recognizes that in all other cases the High Court would be bound to allow costs on the High Court scale; and, accordingly, that, had the present proceedings not been remitted to the county court, the plaintiff, having recovered more than 50*l.*, would have been entitled to costs on the High Court scale. From this premise it is argued that, as the discretion given by s. 73 is expressly made subject to the provisions of s. 47, the only cases in which the county court judge can direct the costs before remission to be taxed on the county court scales are cases in which the High Court would have been bound to order them to be so taxed under s. 47, in the case of a non-remitted action.

In our opinion the primary effect of para. (i.) of the proviso to s. 73 is to limit the discretion of the county court judge by compelling him, in the cases mentioned in s. 47, to award either no costs at all or only county court costs in respect of the proceedings before remission. But there is force in the argument that the proviso goes further than this. Sect. 47 fetters the discretion of the High Court judge as to costs in certain cases where the action could have been commenced in the county court. Prima facie a successful plaintiff in a High Court action is entitled to his costs on the High Court scale. Sect. 47 limits this prima facie right: and it may well be said that, save in the cases specifically mentioned in the section, the High Court judge is not entitled to deprive the successful plaintiff of High Court costs merely on the ground that the action could have been commenced in the county court. To hold otherwise, it is said, would be to give to the High Court judge the right to penalize a successful plaintiff in cases other than those singled out by the Legislature for such treatment. It is not necessary for us to decide whether or not this argument is well founded. Even if it be conceded that the High Court judge has no power to deprive a successful plaintiff of High Court costs, in a case not falling within the class mentioned in s. 47, merely because the action could have been commenced in the county court, we are of opinion that he is entitled to award only county court costs in any case where in his opinion, having regard to all the circumstances, the action ought to have been commenced in the county court; and that the county court judge has a like discretionary power with regard to the costs of a remitted action before remission. In the present case, there is no written record of the learned county court judge's reasons for his decision in the matter of costs. Had the matter stood there, we should have assumed that he exercised his discretion on correct principles, and had formed the opinion that the action ought to have been commenced in the county court. It would be for the appellant to satisfy us that the learned county court judge had exercised his discretion on a wrong principle; and this he has failed to do. There was again a conflict of recollection with regard to the reason given by the learned county court judge—the appellant's counsel thinking that he decided solely on the ground that the action could have been commenced in the county court; the respondent's counsel thinking that he held that the action ought to have been commenced in the county court. In the circumstances we are not entitled to hold that the appellant has discharged the burden which lies upon him to satisfy us that the learned county court judge acted upon a wrong principle.

We must, in conclusion, refer to the case of *Jenkins & Co.* v. *Simon* (1), which was relied on by counsel for the appellant. That was a case which fell within the proviso to s. 11 of the County Courts Act, 1919, which corresponds to sub-s. 4 of s. 47 of the Act of 1934. That proviso said that in the cases mentioned the plaintiff "shall, unless otherwise ordered by "the Court or a judge, be entitled to costs on the High Court "scale." The effect of the county court judge's order in that case was, as was said by Salter J., to nullify this provision. The present case does not fall within sub-s. 4 of s. 47; and the decision in *Jenkins & Co.* v. *Simon* (1) is, in our opinion, not in point.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *A. Wood & Co., for D. Wood & Co., Birmingham.*

Solicitors for respondent: *Ward, Bowie & Co., for Duggan & Elton, Birmingham.*

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(1) [1926] 1 K. B. 111.

W. I. C.

1937
Dec. 15.

THE MASTER AND FELLOWS OF UNIVERSITY COLLEGE, OXFORD *v.* THE SECRETARY OF STATE FOR AIR.

Defence Acts—Land taken compulsorily—Compensation—Injurious affection of adjoining land—Land taken for aerodrome—Defence Act, 1842 (5 & 6 *Vict. c.* 94), *s.* 19.

A piece of land in the middle of an estate belonging to University College, Oxford, was acquired compulsorily for the purpose of an aerodrome by the Secretary of State for Air under the Defence Acts:—

Held, that the Master and Fellows of the College were entitled, under s. 19 of the Defence Act, 1842, to recover compensation for injurious affection of the adjoining land by the use to which the acquired land might be put.

The decision of Ridley J. in *Blundell* v. *The King* [1905] 1 K. B. 516 approved.

CASE stated by an Official Arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, for the opinion of the Court as to whether, on the compulsory acquisition of land by the Crown for the purposes of an aerodrome, the landowners were entitled to recover compensation for injurious affection of their adjoining land by the use to which the land taken might be put.

The claim arose out of the acquisition by the Secretary of State for Air (who under the Air Navigation Act, 1936, was substituted for the President of the Air Council) of a total of 417 acres of land in the centre of an estate belonging to the Master and Fellows of University College, Oxford, at Linton-upon-Ouse, in the North Riding of Yorkshire. There was no dispute as to the price of the land taken or the amount to be paid for " severance "—28,737*l.* in all—but the College claimed, and the Crown contested their liability to pay, a further sum—assessed by the arbitrator at 4000*l.*, if recoverable—for damages for " injurious affection " of the surrounding land owned by the college. It was suggested, for the claimants, that the passage of aeroplanes might interfere with sporting rights or stock-breeding.

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MASTER AND FELLOWS OF UNIVERSITY COLLEGE, OXFORD
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Trustram Eve K.C. (*A. Capewell* with him) for the claimants referred to the Defence Act, 1842, ss. 19, 23, 24 (1); the Defence Act, 1854, which he said enabled the Lands Clauses Act, 1845, to be applied to land acquired under the Act of 1842; and the Defence of the Realm Act, 1860, which assumed that damage might be done by works, and provided that the net damage was to be compensated for after allowing for any "betterment." The argument of the Crown (counsel continued), if right, means that by electing to acquire land under the Defence Act, 1842, they can alter the incidence of compensation. That has been held by the Irish Courts to be

(1) 5 & 6 Vict. c. 94, s. 19: "And be it enacted, that in case any such bodies or other persons hereby authorized to contract on behalf of themselves or others as aforesaid, or any other person or persons interested in any such lands, buildings, or other hereditaments which shall be so marked out and surveyed as aforesaid, ... refuse or decline to treat or agree, or by reason of absence shall be prevented from treating or agreeing with the said principal officers [of Her Majesty's Ordnance], or shall refuse to accept such sum of money as shall be offered by the said principal officers as the consideration for the absolute purchase of such lands, buildings, or other hereditaments . . . . then and in such case it shall be lawful for the said principal officers to require two or more justices of the peace . . . . to put the said principal officers, or any person appointed by them, into immediate possession of such lands, buildings, or other hereditaments; which such justices . . . . are hereby required to do, ... and shall also issue their warrants to the Sheriff . . . . to summon a jury . . . . [to] find the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof . . . ."

Sect. 23: "Provided always . . . . that no such lands, buildings, or other hereditaments shall be so taken without the consent of the owner or owners thereof . . . . unless the necessity or expediency of taking the same shall be first certified by the lord lieutenant or two of the deputy lieutenants . . . . and unless the taking of such lands . . . . be authorized by a warrant under the hand or hands of the lord high treasurer . . . . or unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings, or other hereditaments shall be so taken."

Sect. 24 provides that in all cases where any lands, etc., have been taken for a temporary purpose it shall be lawful for the Crown, at any time before the possession thereof shall be restored to the owner or owners, to remove buildings erected on the land, compensation being made for injury done.

wrong. The point at issue has been the subject of several decisions.

In *Reg.—Ex parte Moore*—v. *Abbott* (1), where land was compulsorily acquired by the War Department for the purpose of a rifle range and camp, the owner of the land was held to be entitled to compensation for injurious affection of his adjoining land.

[LORD HEWART. I observe that Gibson J. says (2): "No "doubt the Defence Act is of national importance, and *salus* "*populi suprema lex*."]

And he added: "But the safety of the State is best secured "by a general average contribution, and not by making "jettison of individual interests." It may be said that in this case the point is mere obiter, but in *In re Ned's Point Battery* (3) there was a decision on the point. So also in *Blundell* v. *The King* (4), where land was taken compulsorily under the Defence Acts for the erection of a fort thereon, the owner was held entitled to compensation for the injurious affection of his adjoining land arising from the natural and ordinary use of the land taken. The two Irish decisions were expressly approved.

[LORD HEWART. I see that in *Blundell* v. *The King* (4), the then Attorney-General said that the Crown desired to have the point decided. Apparently it was decided. Did that case go further?]

No. Moreover, there has been ample opportunity, in legislation since that date, to deal with the matter.

Sir Terence O'Connor S.-G. I have seen the file in *Blundell* v. *The King* (4) The decision was considered by the then Law Officers, who advised that the Crown should do nothing. Before the War very few cases occurred. During the War the question was governed by the Defence of the Realm (Acquisition of Land) Acts, and it is only in very recent times, with the introduction of the new re-armament programme, that the matter has become of importance to the Government, and it is now desired to have the point decided, once for all, by a Court from which there is no appeal.

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(1) [1897] 2 I. R. 362.

(2) Ibid. 405.

(3) [1903] 2 I. R. 192.

(4) [1905] 1 K. B. 516.

Trustram Eve K.C. The Defence Act was passed in 1842. The argument now adopted by the Crown was taken by the then Attorney-General in *In re Laws* (1) in 1847, although only to avoid the payment of costs. There is no suggestion that compensation for " injurious affection " has been refused in nearly one hundred years since the Act of 1842 was passed, although the point has been argued in numerous cases, and compensation amounting to millions of pounds, including compensation for injurious affection, must have been paid by the Crown. Legislation passed during the War has preserved the right to compensation under the Act of 1842, although the Crown must have had it in mind that this point as to injurious affection had been decided against the Crown again and again. The Acquisition of Land (Assessment of Compensation) Act, 1919, has not affected the principle: *Venables* v. *Department of Agriculture for Scotland.* (2). Under the legislation setting up the Air Council in 1917 the Lands Clauses Acts automatically apply to the Air Service, as distinct from the other services which existed before 1845.

Sir Terence O'Connor S.-G. and *H. L. Parker* for the Crown. This question was submitted to Sir Richard Webster and Sir Edward Clarke when they were the Law Officers and they expressed the opinion, although with doubt, that " injurious "affection " was not payable. There have not been a great many cases on the point and counsel for the claimants is not strictly right in surmising that for a great many years before the decision in *Reg.—Ex parte Moore—*v. *Abbott* (3) compensation had been paid upon the basis of the Lands Clauses Act, 1845. In *Sisters of Charity of Rockingham* v. *The King* (4) it was pointed out that compensation can only be claimed under a statutory right. The Crown is in a position different from other undertakers. A local authority acquiring land can be required to state the purpose for which it intends to use the land. The Crown is under no such duty, and the tribunal therefore can have no data on which to assess compensation for injurious affection. On a review of these general considerations the Crown submits that the award of compensation in cases where land is required for the Defence of the Realm has been excluded from the area in which compensation for injurious affection can be awarded. This matter was not in the mind of the Court in *In re Laws.* (1) The dicta of Pollock C.B. in that case was certainly obiter. The matter must ultimately be decided by the statutes. The Defence Act, 1842, provided a quick and convenient mode whereby, when the Realm is in danger, land can be acquired. The procedure under that Act is still followed, although the method of assessment is different. In the Lands Clauses Acts Parliament was not dealing with the Defence of the Realm, but with land taken by local authorities for undertakings of a public nature. Sect. 1 of the Act of 1845 could not have included the Act of 1842, which was not an Act "hereinafter passed." If "compensation" in the Act of 1842 had included reimbursement in respect of damages for injurious affection all the different reiterated provisions in the Act of 1845 would have been unnecessary. Having regard to the uncertainties of the purpose for which land taken by the Government would be used, is it not probable that if the Act of 1842 had been meant to include compensation for injurious affection some code for its assessment would have been laid down?

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(1) (1847) 1 Ex. 441.
(2) 1932 S. C. 573.
(3) [1897] 2 I. R. 362.
(4) [1922] 2 A. C. 315.

[LORD HEWART. If there are these gloomy and unknown possibilities when land is taken by the Crown, how much more reasonable, may it not be, to suppose that "compensa-"tion" was meant not to exclude but to include damages for injurious affection.]

If you take a square yard of a man's land you may be faced, apart from special provision, with an enormous liability for injurious affection of the rest, but if you take the whole of his land, right up to the boundary, the adjoining owners will have no claim, however great the injury may be. That absurdity was seen and dealt with in the Lands Clauses

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(1) 1 Ex. 441.

Act, 1845, but the Defence Act, 1842, contains no similar provision. It is significant that in the Defence of the Realm Act, 1860, also, the wider definition of compensation does not appear. That was a specific Act for the acquisition of specific lands, but nevertheless, looking at that Act, and remembering that the Act of 1845 did extend one view of compensation, it is remarkable that throughout the Act of 1860 the nomenclature of 1842 is followed. It may be that compensation will include some elements other than price, but the Court ought not to carve out of an Act for the acquisition of land for defence purposes a set of rights in futuro arising out of the use to which the land is to be put. There are three ways in which land can be taken for defence purposes: (1.) Under the Lands Clauses Consolidation Acts Amendment Act, 1860, which is permissive, and when embodying the Act of 1845 provides for the payment of injurious affection; (2.) under the Military Lands Act, 1892, a fearfully cumbrous procedure, now practically a dead letter. Under that Act compensation for injurious affection is admitted; and (3.) under the Defence Acts. That method has been preserved to the executive, notwithstanding successive Acts of Parliament dealing with compensation as between the public and public authorities. The Irish cases are not as helpful as they might appear. As to *Blundell* v. *The King* (1), it was wrongly decided, if the Crown's reasoning is correct.

LORD HEWART C.J. This is an award stated in the form of a special case under s. 6, sub-s. 1, of the Acquisition of Land (Assessment of Compensation) Act, 1919. The case raises one question and one alone: Whether the Court is of opinion that the claimants are entitled in law to claim for injurious affection to the remainder of their property by reason of the user to which the land to be purchased may be put by the respondent. Our unanimous answer to that question is, Yes. In cases arising in this way it is not the practice of the Court to enter into reasons, but in this case we will add that we base our answer on the provisions of the

(1) [1905] 1 K. B. 516.

Defence Act, 1842, and in our view the decision of *Blundell* v. *The King* (1), a petition of right tried in 1905 by Ridley J., was right.

BRANSON J. I agree.

PORTER J. I also agree.

Question answered.

Solicitors for claimants: *Field, Roscoe & Co., for Morrell, Peel & Gamlen, Oxford.*

Solicitor for Crown: *Treasury Solicitor.*

(1) [1905] 1 K. B. 516.

A. W. G.

STOCKER AND OTHERS *v.* MINISTER OF HEALTH.

1937
Nov. 24, 25;
Dec. 7.

Housing—Powers of London County Council—Compulsory purchase by Council of land inside a metropolitan borough to abate overcrowding outside the borough—Omission to submit scheme under s. 80 *of Housing Act,* 1925*—Housing Act,* 1925 (15 *Geo.* 5, *c.* 14), *ss.* 57, 58, 64, 80*—Housing Act,* 1935 (25 *&* 26 *Geo.* 5, *c.* 40), *s.* 74, *sub-ss.* 1, 2.

The London County Council, notwithstanding the fact that they have not submitted a scheme for the approval of the Minister of Health under s. 80, sub-s. 2 (*b*) (ii.), of the Housing Act, 1925, have power under s. 74, sub-s. 1 of the Housing Act, 1935, to purchase land within the area of a metropolitan borough for the purpose of providing housing accommodation for persons of the working classes rendered necessary by action taken by the County Council in the displacement of such persons in areas outside that borough, or for the purpose of providing accommodation required to abate overcrowding in metropolitan boroughs outside that borough.

APPLICATION under s. 11, sub-s. 3, of the Housing Act, 1930 (20 & 21 Geo. 5, c. 39), to quash the County of London (Stoke Newington) Housing Order, 1936.

On February 25, 1936, the London County Council, purporting to act under powers contained in the Housing Acts, 1925 to 1935, made an order, the County of London (Stoke Newington) Housing Order, 1936, for the purchase compulsorily for the purposes of Part III. of the Housing Act, 1925 (which Part III. deals with the "Provision of Houses "for the Working Classes"), of the lands described in the schedule thereto. This included "tennis courts, land and "roadway" appurtenant to Northumberland House, Green Lanes, Stoke Newington, which was vested in the applicants as trustees of the will of Alonzo Henry Stocker, deceased. Northumberland House was used as a mental home.

Objection to the order was made by the applicants and other owners and occupiers of land included in the schedule, and also by the Stoke Newington Borough Council, and a public local inquiry was held by an inspector appointed by the Minister of Health. On April 12, 1937, the Minister confirmed the order.

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Stocker v. Minister of Health.

The valuer to the London County Council gave evidence at the inquiry that the scheduled lands were required by the Council for the purpose of the abatement of overcrowding in districts outside the borough of Stoke Newington—namely, in the boroughs of Finsbury, Hampstead, Holborn, Islington, St. Marylebone, St. Pancras, Bethnal Green, Hackney, Poplar, Shoreditch and Stepney, and that it was the purpose of the Council, after acquiring the lands, to demolish the buildings thereon and erect blocks of flats for housing persons of the working classes who would be turned out of their dwellings in the said districts by reason of action taken by the Council in dealing with clearance areas. No scheme under s. 80 of the Housing Act, 1925, had been prepared. The Council purposed to purchase land from time to time in order to create what was described as a "housing pool"—i.e., a number of separate areas of land which could be developed when and for such purposes as the Council might think fit.

The area comprised in the order was a residential district containing many large houses with large gardens appurtenant thereto.

By the Housing Act, 1925 (15 Geo. 5, c. 14), s. 57: "(1.) A "local authority may provide housing accommodation for the "working classes—(*a*) by the erection of dwelling-houses on "any land acquired or appropriated by them; (*b*) by the "conversion of any buildings into dwelling-houses for the "working classes; (*c*) by acquiring houses suitable for the "purpose; . . . . Except where the local authority is a "rural district council, any such powers as aforesaid may, "for supplying the needs of the district, be exercised outside "the district of the local authority."

Sub-s. 2 authorizes the alteration, enlargement, repair, etc., of houses.

Sect. 58, sub-s. 1 (*b*), deals with the acquisition of houses and land occupied therewith, and (*c*) deals with the acquisition of land for the purpose of the erection thereon of dwelling-houses for the working classes by persons other than the local authority. Sub-s. 2 deals with the acquisition by agreement of dwelling-houses built or to be built afterwards.

Sect. 58: "(1.) A local authority shall have power under "this Part of this Act—(*a*) to acquire any land, including "any houses or other buildings thereon, as a site for the "erection of dwelling-houses for the working classes."

Sect. 64: "A local authority may be authorised to purchase "land compulsorily for the purposes of this Part of this Act, "by means of an order submitted to the Minister and confirmed "by him in accordance with the Third Schedule to this Act: "Provided that nothing in this Act shall authorise the "compulsory acquisition for the purposes of this Part of this "Act of any land which is the property of any local authority "or has been acquired by any corporation or company for "the purposes of a railway, dock, canal, water, or other "public undertaking, or which at the date of the order forms "part of any park, garden, or pleasure ground, or is otherwise "required for the amenity or convenience of any house."

Sect. 80: "(1.) The local authority for the purposes of "this Part [Part III.] of this Act shall—(*a*) as respects the "City of London, be the Common Council; (*b*) as respects "any other part of the administrative county of London, be "the London County Council or the metropolitan borough "council as hereinafter provided;—(*c*) elsewhere be the council "of the borough or urban or rural district. (2.) For determining "whether in any case the London County Council or the "metropolitan borough council is to be the local authority "for the purposes of this Part of this Act the following rules "shall have effect—(*a*) the London County Council shall be "the local authority for the county, to the exclusion of any "other authority, so far as regards the provision of any houses "outside the administrative county of London; (*b*) a metropolitan borough council shall be the local authority for the "metropolitan borough, to the exclusion of any other "authority, so far as regards the provision of houses within "the metropolitan borough: Provided that . . . . (ii.) where "the London County Council are satisfied that there is "situate within the area of a metropolitan borough land "suitable for development for housing, the county council "may submit a scheme for the approval of the Minister for "the development of such land to meet the needs of districts "situate outside the area of such borough, and the county "council may carry into effect any scheme which is so "approved, and such approval shall have the like effect as "if it had been given under section sixty of this Act."

Housing Act, 1935 (25 & 26 Geo. 5, c. 40), s. 74: "(1.) Notwithstanding anything contained in section eighty of "the Act of 1925 the London County Council shall be a local "authority for the purposes of Part III. of that Act as respects "any part of the administrative county of London, other "than the city of London, for the purpose of providing "housing accommodation for persons of the working classes, "being either (*a*) accommodation rendered necessary by "displacements occasioned by action taken by the county "council or by a metropolitan borough council under the "Act of 1930 for dealing with a clearance area or for the "demolition of insanitary houses; or (*b*) accommodation "required for the purpose of the abatement of overcrowding; "(*c*) accommodation rendered necessary by displacements "occasioned by action taken by the county council or by a "metropolitan borough council under Part I. of this Act. "(2.) Notwithstanding anything contained in section eighty of "the Act of 1925 the London County Council shall be a local "authority as respects any part of the administrative "county of London, other than the city of London, for the "following purposes, that is to say, for the purposes of "(*a*) paragraphs (*b*), (*c*) and (*d*) of subsection (1) of section "fifty-seven of the Act of 1925; (*b*) subsection (2) of section "fifty-seven of the Act of 1925, so far as that subsection relates "to houses converted or acquired by a local authority; "(*c*) paragraphs (*b*) and (*c*) of subsection (1) of section fifty-"eight of the Act of 1925. (3.) Nothing in this section shall "affect the powers conferred on a metropolitan borough council "by the Act of 1925 or the Act of 1930 with respect to the "provision of housing accommodation within their borough."

Sydney G. Turner K.C., *A. H. Forbes* and *W. H. Gattie* for the applicants. The order was bad in that it purported to authorize the London County Council to purchase compulsorily land in a metropolitan borough for the purpose of providing housing accommodation for persons of the working class outside that borough who had been displaced by the making of clearance areas outside the borough, or for the purpose of abating overcrowding outside the borough. The only way in which the Council could lawfully do that was by a scheme under s. 80, sub-s. 2 (*b*) (ii.), of the Housing Act, 1925, approved by the Minister, and no such scheme was prepared. Local authorities had power under s. 58, sub-s. 1 (*a*) of the Housing Act, 1925, to acquire land as a site for the erection of dwelling-houses for the working classes, and s. 57, sub-s. 1 (*a*), empowered them to erect such houses thereon. So far no power is conferred on the London County Council, but it is said that s. 74 of the Housing Act, 1935, does so, because by sub-s. 1 it constitutes the Council a local authority for the purposes of Part III. of the Act of 1925, which deals with the provision of houses for the working classes. But sub-s. 1 should be read in conjunction with sub-s. 2, which only makes the Council a local authority when dealing with houses, and not with the purchase of land. Sect. 74 does not give the Council any greater power to purchase land in a borough in order to accommodate persons outside the area than that possessed by local authorities under the Act of 1925, and does not extend the powers of such local authorities. Sect. 58, sub-s. 2, of the latter Act confines the powers of the county council as a local authority to the conversion, acquisition, and alteration, etc., of houses, and does not deal with the acquisition of land. Even assuming that the power to acquire land is conferred, that must mean that it is "required" or "necessary" for present needs, and not future needs, and the evidence given at the inquiry ought not to have satisfied the Minister that there was a present requirement or necessity, and the Court is not bound by the statement of the Minister that he is satisfied.

Sect. 64 of the Act of 1925, which confers the power of compulsory purchase on local authorities, contains a proviso that nothing in the Act shall authorize the compulsory acquisition of land which at the date of the order forms part of any park, garden, or pleasure ground, or is otherwise required for the amenity or convenience of any house. As appears from the affidavit of Mr. Wrigley, which sets out the facts of the case, the lands proposed to be purchased were of this description. Therefore they were protected by the terms of the proviso.

Sir Terence O'Connor S.-G. and *Valentine Holmes* for the respondent. Sect. 74 of the Housing Act, 1935, gives the Council full power to obtain and act on the order in question, and their powers are not restricted by the necessity of framing and getting approved a scheme under s. 80, sub-s. 2 (*b*) (ii.), of the Act of 1925, because by the express terms of sub-ss. 1 and 2 of s. 74, s. 80 is to be ignored in construing that section. There is nothing in s. 74, sub-s. 1, of the Act of 1935 which restricts the powers of the Council in the way suggested, the whole of the administrative county of London being within their jurisdiction. Thus the contention of the appellant that s. 74, sub-s. 2, must be read with sub-s. 1 so as to make the Council a local authority only when dealing with the acquisition, etc., of houses and not when dealing with the purchase of land has no foundation, and the sub-sections should be treated as independent. Sub-s. 1 makes the Council a local authority when dealing with the provision of houses for the working classes, which is the material matter here, while sub-s. 2 makes the Council such authority for other purposes, though there may be some overlapping.

It may be that the accommodation " rendered necessary " or " required " within the meaning of s. 74, sub-s. 1, does not refer to the future ; but the evidence given at the inquiry shows that accommodation is required at the present time.

With regard to the contention that these lands are within the protection of the proviso in s. 64 of the Act of 1925 as being " required for the amenity " of a house, this is a question of fact for the Council and the Minister and there was ample evidence to support their conclusion, with which this Court will not interfere.

Cur. adv. vult.

1937. Dec. 7. DU PARCQ J. read the following judgment: This is an application to quash, either wholly or in part, the County of London (Stoke Newington) Housing Order, 1936, which was confirmed by the Minister of Health on April 12, 1937.

It was submitted on behalf of the applicants that the order was wholly bad in that it authorized the London County Council to purchase compulsorily land in the metropolitan borough of Stoke Newington, and so arrogated to the London County Council a power which it could not obtain lawfully except after the submission and approval of a scheme under s. 80, sub-s. 2, proviso (ii.), of the Housing Act, 1925.

On behalf of the Minister it was contended that s. 74, sub-s. 1, of the Housing Act, 1935, gave power to the London County Council to make the order in question, subject to the confirmation of the Minister, without the submission of such a scheme.

The decision on this point depends ultimately upon the true construction of s. 74 of the Housing Act, 1935. Part III. of the Act of 1925, to which that section refers, dealt with the " Provision of Houses for the Working Classes " and gave extensive powers to local authorities. A local authority was given power by s. 58, sub-s. 1 (*a*), " to acquire any land, "including any houses or other buildings thereon, as a site for "the erection of dwelling-houses for the working classes," and by s. 57, sub-s. 1, to " provide housing accommodation "for the working classes—(*a*) by the erection of dwelling-"houses on any land acquired or appropriated by them." The power of compulsory purchase was conferred upon local authorities by s. 64 of the Act of 1925. The importance of s. 74, sub-s. 1, of the Act of 1935 is that it makes the London County Council " a local authority for the purposes of "Part III " of the Act of 1925.

Each of the two material sub-sections of s. 74 begins with the words " Notwithstanding anything contained in section 80 "of the Act of 1925." It seems to me to be plain that in construing the succeeding words s. 80 of the 1925 Act is to be left out of account in so far as it contains anything which, if effect had to be given to it, would limit to any degree the new powers conferred on the London County Council by s. 74. Further, I am of opinion that it is impossible to limit the scope of s. 74, sub-s. 1, by any reference to s. 74, sub-s. 2. The two sub-sections can, and in my opinion ought to, be read separately, even though the powers which they confer may overlap. Sub-s. 2 made the London County Council a local authority for certain purposes. A reference back to the Act of 1925 shows that these purposes include the acquisition of houses and other buildings for the accommodation of the working classes, but do not include the purchase of land with a view to the erection of houses on it by the authority itself. Thus, sub-s. 2 gives the London County Council no power to buy land in a borough in order to build houses thereon even though there may be pressing need for the accommodation which such houses would provide. But within the limits set by sub-s. 2 the London County Council is free to act as a local authority, even though the need for the houses which it is acquiring or the other steps which it may be taking cannot be assigned to any specific cause such as the specific causes enumerated in sub-s. 1 (*a*), (*b*) and (*c*).

Sub-s. 1, on the other hand, as I read it, permits the London County Council to acquire land and itself to erect houses on the land acquired, and indeed to carry out all the purposes of Part III. of the Act of 1925, subject to the limitation that these wide powers may be exercised only where the housing accommodation which it provides is "rendered necessary" (or "required") for the specific purposes mentioned in the sub-section under (*a*), (*b*) and (*c*). It follows, in my opinion, that unless it can be shown that the order in question is not within the powers of the Act as limited by the terms of (*a*), (*b*) and (*c*), the attack upon it as a whole must fail.

It now becomes necessary to examine two further contentions on the part of the applicants. First it is contended that s. 74, sub-s. 1, ought not to be construed as giving power to the London County Council to provide accommodation in a borough for the abatement of overcrowding outside that borough or for housing persons displaced by clearance orders affecting areas outside that borough. I cannot so read the section. In my opinion, the Act empowers the London County Council (within the prescribed limits) to provide accommodation in any part of the administrative county of London (other than the City), without regard to the question whether the parts of the county from which the persons to be accommodated will be brought are or are not within the same borough as that in which the accommodation is provided. I find nothing in the Acts to show a contrary intention. It is to be observed that when the Legislature intended to confine the powers of the London County Council within the limits of a borough, that intention was expressly and clearly stated: see s. 16, sub-s. 9, of the Housing Act, 1930 (20 & 21 Geo. 5, c. 39).

Secondly it was argued that the purpose of the order appeared to be the provision of accommodation for which there was no present need, and that the London County Council derived no power from s. 74, sub-s. 1, to make provision for possible future needs. The applicants have failed to satisfy me that there is any substance in this contention. I assume for the purposes of this case, and indeed I have little doubt (though it is not necessary that I should now decide), that if the applicants satisfied me on proper materials that the Minister had put a wrong interpretation on the Act and thus had been led to decide erroneously that the order was within the powers of the Act, the Court would not be precluded from quashing the order merely because the Minister declared himself to be satisfied that in fact the terms of the Act had been complied with. Further, I am of opinion that the reference under s. 74, sub-s. 1 (*a*) and (*b*), of the Act of 1935 to accommodation "rendered necessary" and "required" does not extend to include accommodation which may possibly be rendered necessary or required in the future, but only to accommodation of which it can be said, at the time when the order is made, under (*a*) that action already has been taken which makes it necessary to provide accommodation in advance of displacements which will become necessary as the demolition of buildings in one or more clearance areas proceeds (see the Housing Act, 1930, in particular s. 1 thereof), and under (*b*) that accommodation for the purpose of the abatement of overcrowding is then required.

I had before me the evidence on affidavit of Mr. Wrigley, director and principal assistant secretary of the Housing and Town Planning Division of the Ministry of Health, who stated that he was authorized by the Minister of Health to make his affidavit. It appears from his evidence that the Minister, before confirming the order, considered a report as to the evidence given at the inquiry which had been held in pursuance of the Acts, and as to an inspection which had been made of the properties included in the order. The affidavit proceeds as follows: "As a result of such consideration it "was decided that the properties, the subject-matter of this "appeal, were required by the London County Council for "the purpose of providing housing accommodation for persons "of the working classes being (*a*) accommodation required for "the purpose of the abatement of overcrowding, and/or "(*b*) accommodation rendered necessary by displacements "occasioned by action taken by the County Council under the "Housing Act, 1930, for dealing with clearance areas, and "that the order ought to be confirmed."

Mr. Wrigley's evidence would have been clearer and more precise if he had avoided the use of the compound conjunction "and/or" in this paragraph of his affidavit. If his words are translated into more correct and less commercial English, I take them to mean, upon a strict interpretation, that the Minister decided that the accommodation either was required for the abatement of overcrowding or was rendered necessary by displacements, or again might be both required for the one and rendered necessary by the other, but that he was not prepared to commit himself more definitely. It seems to me obvious that if, as I am assuming, the Court is not only entitled but bound to ascertain whether the Minister has formed a correct opinion as to the powers conferred by the

Act, a judge might find himself embarrassed by so non-committal a statement. In this case, however, there is no suggestion, nor have I any suspicion, that the words were chosen with any desire to avoid a definite decision by taking refuge in ambiguity, and perhaps it would be pedantic to insist too much upon the literally exact meaning of Mr. Wrigley's words, which I think that I am entitled to read in the light of the other evidence before me. I have been referred by counsel on both sides to what they consider to be the material passages in the evidence at the inquiry. In my view there was abundant evidence that the accommodation was required at the date of the order for the purpose of the abatement of overcrowding in other parts of London. It is not so clear that the accommodation has been rendered necessary by displacements occasioned by action taken by the County Council under the Act of 1930. I gather from the evidence that the paramount purpose for which the accommodation is required is the abatement of overcrowding and that it is not intended to use it except to a comparatively small extent for the housing of the displaced inhabitants of clearance areas. I have in mind particularly an answer given by the valuer to the London County Council at p. 44 of the transcript of the evidence at the inquiry. In so far as the Minister has decided that some part of the accommodation is rendered necessary by displacements, I need only say that, assuming my construction of the material words in the section to be correct, the applicants have not satisfied me that he has taken a wrong view of the powers conferred by the Act, or that those powers have been exceeded.

I have now disposed of the case, with the exception of that part of the application which asks that the order may be quashed in so far as it affects certain lands which are the property of the applicants as trustees. The ground of this part of the application is that the lands in question were, it is said, within the protection of the proviso to s. 64 of the Housing Act, 1925, which exempts from compulsory acquisition any land " which at the date of the order forms part of "any park, garden, or pleasure ground, or is otherwise "required for the amenity or convenience of any house." It is not suggested that the Minister has misconstrued these words, and it cannot be said that there was no material before the London County Council, or the Minister, on which it could be held, as a fact, that the lands were not within the terms of the proviso. In other words, the Court is being asked to do what it was held by Swift J. that the Court had no right to do—namely, to interfere with a finding of fact. See *In re Bowman. South Shields (Thames Street) Clearance Order*, 1931 (1) and *Halse* v. *Minister of Health.* (2) I hold, following those decisions, that this part of the application also fails.

It is perhaps desirable that I should add that, although I have had to deal with this application under the Housing Acts, 1925 to 1935, which, with certain irrelevant exceptions, have now been repealed and in substance re-enacted by the Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51), I see no reason to think that I should have had any difficulty in arriving at the same result if it had been necessary for the decision of the case to construe the consolidating Act of 1936.

The application is dismissed.

Solicitor for applicants: *S. H. White.*
Solicitor for respondent: *Solicitor to Minister of Health.*

(1) [1932] 2 K. B. 621, 634, 635. (2) (1937) 35 L. G. R. 421.

W. L. L. B.

EGAN *v.* LANGHAM INVESTMENTS, LIMITED.

1937
Dec. 7.

[1937. E. No. 406.]

[London No. 1937. E. No. 252.]

Moneylender—Series of transactions—Bill of sale—Condition that balance owing on previous loan should be paid off out of new loan—No mention of condition in memorandum—Contract not fully set out in memorandum—Omission—Contract unenforceable—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), *s.* 6.

By s. 6 of the Moneylenders Act, 1927, no contract for the repayment by a borrower of money lent to him by a moneylender, or for the payment by him of interest on money so lent, and no security given by the borrower in respect of such a contract, shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower. The section (by sub-s. 2) requires that the note or memorandum shall contain all the terms of the contract.

Where, therefore, a borrower obtains a loan from a registered moneylender, and it is a term or condition of the contract between him and the moneylender that the outstanding balance of a former loan shall be repaid by the borrower out of the new loan, failure to include that term or condition in the note or memorandum required by s. 6 of the Act of 1927 renders the contract and the security (in this case a bill of sale) unenforceable.

Dunn Trust, Ld. v. *Teale* ((1928) Charles J., Leeds Assizes, unreported) and *Sutton* v. *Leuchtenberg* ((1933) unreported), followed.

ACTION tried without a jury.

The plaintiff had had a number of loan transactions with John Wallingford, Ld., registered moneylenders. The loans were secured by bills of sale on certain chattels. On May 7, 1936, the plaintiff, being then indebted to John Wallingford, Ld., applied to them for a further loan. They were unwilling to grant him a further loan, but they introduced him to the defendants, who were also registered moneylenders. The defendants were willing to advance 85*l.* to the plaintiff on the security of a bill of sale, provided that out of that 85*l.* the debt to John Wallingford, Ld., was paid off. In the end this was agreed to, and 79*l.* was handed to a representative of John Wallingford, Ld., and 6*l.* to the plaintiff. The trial judge found on the evidence that it was a term or condition of the contract between the defendants and the plaintiff,

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and a part of the bargain under which the defendants lent the 85*l*. to the plaintiff, that the 79*l*. owing to John Wallingford, Ld., should be paid out of it.

In the bill of sale the consideration was stated to be 85*l*., and provision was made for interest at the rate of 48 per cent. per annum. The memorandum required by s. 6 of the Moneylenders Act, 1927 (1), contained no reference to the condition or term of the contract that John Wallingford, Ld., were to be repaid out of the 85*l*. advanced by the defendants.

On October 20, 1936, there was a further loan transaction. The following letter was dictated by the defendants' representative to his typist and signed by the plaintiff: "I beg "to make application for a loan of 92*l*. on the security of my "furniture and effects—namely, a bill of sale, out of which "advance I desire to pay off the balance outstanding on my "existing account with your company." In the bill of sale of October 20, 1936, the consideration was stated to be 92*l*. and interest was to be at the rate of 48 per cent. per annum. The memorandum under s. 6 of the Moneylenders Act, 1927, contained no mention of the condition that the balance owing to the defendants on the previous bill of sale should be paid off out of the 92*l*.

The plaintiff sued the defendants for a declaration that the bill of sale of October 20, 1936, given by him as a security for a loan from the defendants was illegal, void and/or unenforceable by reason of contraventions of the Bills of Sale Act (1878) Amendment Act, 1882, and the Moneylenders

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(1) The Moneylenders Act, 1927 (17 & 18 Geo. 5, c. 21), s. 6: "(1.) No contract for the repayment by a borrower of money "lent to him or to any agent on "his behalf by a moneylender "after the commencement of this "Act or for the payment by him "of interest on money so lent and "no security given by the borrower or by any such agent as "aforesaid in respect of any such "contract shall be enforceable, "unless a note or memorandum in "writing of the contract be made "and signed personally by the "borrower, and unless a copy "thereof be delivered or sent to "the borrower within seven days "of the making of the contract; ". . . ."

"(2.) The note or memorandum "aforesaid shall contain all the "terms of the contract, and in "particular shall show the date "on which the loan is made, the "amount of the principal of the "loan. . . . ."

Act, 1927, and for consequential relief. In his statement of claim the plaintiff alleged (inter alia) that the bill of sale of October 20, 1936, was a renewal of a moneylending transaction by way of bill of sale entered into between the plaintiff and the defendants on May 7, 1936, that the considerations set out in the bills of sale of May 7, 1936, and October 20, 1936, were not truly stated, and that the provisions of s. 6 of the Moneylenders Act, 1927, were not complied with, as the note or memorandum of the respective contracts of May 7, 1936, and October 20, 1936, did not set out all the terms of the contract, and in particular did not show the amount actually lent to the plaintiff nor any agreement with regard to the application of the consideration recited in the bills of sale.

The defendants denied (inter alia) that the bill of sale dated October 20, 1936, was in any way a renewal of the moneylending transaction entered into between the plaintiff and the defendants on May 7, 1936. They pleaded that it was an entirely new transaction. The defendants also denied either that the considerations were not truly stated, or that the provisions of s. 6 of the Moneylenders Act, 1927, were not complied with, or that the notes or memoranda of the respective contracts did not set out all the terms of those contracts, or that the amount actually lent to the plaintiff on each occasion was not truly set out in the relevant note or memorandum. They counterclaimed 97*l.* 5*s.* 9*d.* alleged to be due for principal and interest under the bill of sale of October 20, 1936.

G. O. Slade for the plaintiff. The transaction in question was, in effect, a renewal of a former moneylending transaction by way of a bill of sale, entered into between the parties. It was a term or condition of the contract between the plaintiff and the defendants that the outstanding balance of the old loan should be paid off out of the new loan. That term or condition was not mentioned in the note or memorandum under s. 6 of the Moneylenders Act, 1927, and therefore the bill of sale of October 20, 1936, is unenforceable owing to the contravention of s. 6 of the Act of 1927.

There is an unreported decision of Charles J. in *Dunn Trust, Ld.* v. *Teale* (1) to the effect that where an old debt purports to be settled by a new loan, a statement to that effect must appear in the memorandum. That decision was referred to without disapproval by Scrutton L.J. in *B. S. Lyle, Ld.* v. *Chappell.* (2)

[*Sutton* v. *Leuchtenberg* (3) was referred to.]

N. F. Stogdon for the defendants. The bill of sale dated October 20, 1936, was in no way a renewal of a former moneylending transaction between the parties. This is a bill of sale case, not a moneylending case solely. The bill of sale is in the form required by the Bills of Sale Acts and the consideration is truly stated. The fact that the full amount stated in the bill of sale was not handed over to the borrower, but a part of that sum was deducted to pay off the balance owing on the previous loan, did not render the bill of sale invalid. What was done here was that the loan was applied in part to the repayment of what was owing on the former loan and the net amount was handed over to the borrower. The plaintiff is not entitled to the declaration claimed.

DU PARCQ J. [after stating the facts and reading s. 6 of the Moneylenders Act, 1927:] The Courts have had to deal with the class of case where the consideration was said to be a loan of, let us say, 100*l.*, and where the only money which had passed was 20*l.*, the reason being that the man who had promised to lend 100*l.* already had 80*l.* owing to him by the borrower, and he said in effect: "It is no use my handing you 100*l.* for you to hand "me back 80*l.* It is no use going through the form of "handing money backwards and forwards, so I will hand you "the net amount which is due, having applied the loan in part "to the repayment of what you already owe me." In dealing with that class of case the Court applied the principle of *In re Harmony and Montague Tin and Copper Mining Co., Spargo's*

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(1) (1928) Leeds Assizes (unreported).
(2) [1932] 1 K. B. 691.
(3) (1933) du Parcq J. (unreported).

Case, where Mellish L.J. said (1): "Indeed, it is a general rule "of law, that in every case where a transaction resolves itself "into paying money by A. to B., and then handing it back "again by B. to A., if the parties meet together and agree to "set one demand against the other, they need not go through "the form and ceremony of handing the money backwards "and forwards."

Counsel for the defendants, who has argued this case most clearly and, if I may say so, most ably, said that this was a bill of sale case, not a moneylending case solely. But the answer to that is that although it is a case which it might have fallen to me to decide under the Bills of Sale Acts, it has become my duty to decide it under the Moneylenders Act, 1927, and it may well be that the Bills of Sale Acts are complied with and the Moneylenders Act, 1927, is not complied with. The consideration may be stated accurately for the purposes of the Bills of Sale Acts, whereas the contract which is required to be set out in the note or memorandum is not properly set out for the purposes of the Moneylenders Act, 1927. The Act speaks of a "contract for the repayment by "a borrower of money lent." I agree with Mr. Slade that there are of course two sides to every contract, and when you look at a contract for the repayment by a borrower of money lent you are also looking at a contract under which the lender agrees to lend. The lender may impose terms of his own for the acceptance of the borrower, and the borrower of course may sometimes be able to insert into the contract terms which he suggests and which the lender accepts. Supposing the contract to be not merely "I will lend you X*l.*," but "I will "lend you X*l.* if you will use part of that X*l.* for a specific "purpose, and otherwise I will not lend it to you," I think, apart from authority, one can say that that is a term of the contract for the repayment by the borrower of money lent to him. I do not think the Act means that you must only set out half the contract, that is to say, the half which imposes on the borrower terms as to repayment. I think you must include all the terms of the contract under which, because money has been lent to him, it becomes obligatory on him to repay it, and one of the terms of the contract under which that money has been lent to him may be a term which lies at the root of the contract, because the lender may say: Unless you promise this, I shall not lend the money. In other words, part of the contract for this loan is the promise which you are making to me.

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(1) (1873) L. R. 8 Ch. 407, 414.

Looking at the evidence and at the whole of the facts and considering the inferences to be drawn from them, it seems to me clearly that in the one case [i.e., the transaction of May 7, 1936] there was a promise to repay Wallingfords, which was, and was intended to be, part of the contract between the parties, and that in the other case [i.e., the transaction of October 20, 1936] there was a promise to repay the defendants the former loan, which was intended to be and was part of the contract, so that, apart from authority, I should say that that term of each contract ought to be included in the memorandum under s. 6 of the Moneylenders Act, 1927, and no such term is included in the memorandum here.

That is my view, apart from authority. I may perhaps say, incidentally, that I expressed that view on a previous occasion in a written judgment in *Sutton* v. *Leuchtenberg* in 1933, which was not reported. In that case I expressed my agreement with the decision of Charles J. in *Dunn Trust, Ld.* v. *Teale* (1), though on the facts, as I found them, it did not become necessary to follow it.

I see no reason for changing the view which I expressed then, but of course I should not seek to cling to that view—I should have no right to do so and I should not desire to do so—if there had been any decision of the Court of Appeal which showed that the view which I then held was wrong, or, to put it in another way, that the view held and expressed by Charles J. was wrong. I cannot see that the Court of Appeal have ever indicated any dissent from the view of Charles J. when it has been before them. On the contrary, when it was before the Court of Appeal, in what was no doubt an

(1) (1928) Leeds Assizes (unreported).

obiter dictum, Scrutton L.J. said in *B. S. Lyle, Ld.* v. *Chappell* (1) that it was safer to follow the decision of Charles J. All of us who remember Scrutton L.J. know that, if he formed a view adverse to a view which had been expressed, he was not reluctant to express it, except when he thought it wiser not to express a view because it was not necessary to the decision of the case. I see nothing in his language to suggest that he thought that Charles J. was wrong, and I read his language as meaning that provisionally, at any rate, he was inclined to think that Charles J. was right notwithstanding the bill of sale cases.

The consequences of an opposite decision might be very grave. I think that in a case like this they would be very grave, because it is desirable that the Court should know beyond any possibility of dispute exactly what is the agreement between the parties. The consequences may also be very grave where a moneylender says: "I will lend you this "sum only on condition that you will apply a large part of "it in purchasing from me, at a price which may be ten times "its proper value, some chattel which I am prepared to sell "to you." As I have said, I do not think it is necessary to strain the language of the Act at all to give effect to what is contended for by Mr. Slade; but if the words of the Act were ambiguous—and I do not say they are; I do not myself think they are—then I am inclined to think that, although I know one must not interpret the Moneylenders Act, 1927, more in favour of borrowers than in favour of lenders, by any means, still it would be right to say that the intention of the Legislature must be that such a term as this should be included in the memorandum.

The result is that I am here in this position. I take a view myself of this Act which is entirely in accordance with that of Charles J. The Court of Appeal have considered Charles J.'s view, and far from finding that they said that it was wrong I find that Scrutton L.J. seemed rather to approve it. In those circumstances, I think that my duty is clear: I must follow the decision of Charles J., and accordingly find that

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(1) [1932] 1 K. B. 691, 701.

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there was an omission in the memorandum, with the result that the plaintiff succeeds and is entitled to the declaration prayed.

Judgment for the plaintiff.

Solicitors for the plaintiff: *Tudor & Rowe, for Gee, French & Entwistle, Liverpool.*

Solicitors for the defendants: *Tredgolds & Idris.*

T. W. M.

RAWLINGS *v.* SMITH.

1937
Dec. 14.

Criminal law—Suspected person loitering with intent to commit felony—Inclusion in category of suspected persons before charge of loitering with intent—Series of acts occurring on same day—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *s.* 4—*Penal Servitude Act,* 1891 (54 *&* 55 *Vict. c.* 69), *s.* 7.

The appellant was charged with being a suspected person loitering with intent to commit a felony within the meaning of s. 4 of the Vagrancy Act, 1824, as amended by s. 7 of the Penal Servitude Act, 1891. The evidence showed that the appellant was seen on various occasions over a period of about one hour and forty minutes on the same day to look into unattended motor-cars, try the doors, and on one occasion to open a door of a car. On the last of such occasions he was arrested :—

Held, that as there was a clear distinction between the antecedent acts which occasioned the suspicion and brought the appellant within the category of suspected persons and the act which was the culminating point of a series of acts, which caused him to be arrested on the charge of loitering with intent, the appellant could be convicted. It was not a case where one and the same act was relied on as giving rise to suspicion and as occasioning the arrest.

Hartley v. *Ellnor* (1917) 117 L. T. 304 followed.

Ledwith v. *Roberts* [1937] 1 K. B. 232 distinguished and explained.

CASE stated by the chief magistrate sitting at Bow Street.

An information was preferred on April 6, 1937, by the appellant, Henry Rawlings, a detective constable of the Metropolitan Police, against the respondent, John Thomas Smith, charging him under s. 4 of the Vagrancy Act, 1824 (5 Geo. 4, c. 83), as amended by s. 15 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), and expanded by s. 7 of the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), with being a suspected person loitering in Church Street and certain other streets in the district on February 27, 1937, with intent to commit a felony.

Upon the hearing the following facts were proved: The respondent was first seen in Church Street on February 27 aforesaid by Mr. John Wheeler, a chauffeur. He saw the respondent go to two cars parked in front of Mr. Wheeler and try to open the near-side door in each car. They were apparently locked and he did not succeed. He then went to a car behind Mr. Wheeler and tried to open the rear near-side door, but was again unsuccessful. He walked away towards Cambridge Circus; Wheeler drove into Greek Street, and shortly after saw the respondent looking into a car parked outside a public-house. Later he saw him open the rear near-side door and lean inside. He then left the car and did not appear to have taken anything. Wheeler then reported these facts to Police-constable Milman, who was in uniform, at 9.25 P.M. and pointed out the respondent to him. The respondent then entered a public-house, leaving after a short time and entering another opposite.

Milman reported the matter to the appellant, and the respondent was next seen by the appellant and Milman at about 9.45 P.M. standing at the corner of Greek Street. He walked slowly along Greek Street looking into unattended cars. On reaching Church Street he crossed to the south side and walked slowly westwards looking into unattended cars. About fifteen yards from the corner of Greek Street he stopped, looked up and down the street, and then tried to open the rear near-side door of a car, but failed. He walked on, stopped by another car, and tried to open the rear near-side door, but failed. He continued to the corner of Frith Street, where he stopped and looked about. After a few seconds he retraced his steps to the last car of the line. He looked about and tried the near-side door handle, but again failed. He then walked to the "Three Greyhounds" public-house and entered it at 10.10 P.M. At about 10.50 P.M. the respondent was seen by the appellant and Police-constable Eadie in Old Compton Street. He was looking up and down the street and after a short time he walked to Wardour Street, and turned left to Gerrard Street, looking into unattended cars as he went. In Gerrard Street he tried the rear near-side door of a saloon car, but it was locked, and he walked slowly away. At the corner of Macclesfield Street he stopped, and after looking about him, returned to a car and tried the rear near-side door, but failed to open it. He then walked up Macclesfield Street towards Church Street followed by the appellant and Police-constable Eadie.

At 11.5 P.M. at the corner of Church Street and Macclesfield

Street, on a signal from the appellant, the respondent was arrested by Police-constable Eadie. He was very violent. When charged at Vine Street he said: "You have not seen "me do much." The police-officers did not know the respondent before the day in question.

Subsequently to his arrest it became known to the police that the respondent had been convicted on October 20, 1932, and sentenced to three months' imprisonment at Salford as a suspected person loitering with intent to commit a felony, which conviction was proved before the magistrate.

The appellant stated in evidence, and it was accepted by the magistrate, that he suspected the respondent when the facts were reported to him by Police-constable Milman. Milman stated that he suspected him as a result of his conduct and from the facts reported to him by Mr. Wheeler.

It was contended on behalf of the appellant that the respondent was by reason of his antecedent conduct and/or record a suspected person, and that being a suspected person he was loitering with intent to commit a felony.

The magistrate found as facts that the respondent was loitering in a public place and that he did intend to commit a felony, but for reasons he set forth in his judgment he was of opinion that the respondent could not be classified as a suspected person.

On the point of law the magistrate said that it must be shown that the respondent belonged to the category of suspected persons, and then that he was loitering in a public place with intent to commit a felony.

There were two possible ways of regarding the respondent as belonging to the category of suspected persons: (1.) by reason of his previous conviction, and (2.) by his previous actions earlier on the same day. He was prepared to hold, that in a proper case proof of the previous conviction, whether known to the appellant or the constables at the time or not, might be sufficient. But it seemed obvious that where a person became a suspected person by reason of a previous conviction he could not remain for ever in that category. The conviction in this case was about five years ago, and there was no evidence that he had not lived honestly since; therefore he thought he had ceased on that ground to belong to the category of suspected persons.

With regard to the other ground suggested, namely, the tampering with the cars, without attempting to lay down any rule that a course of conduct on the same day would not suffice to bring a man into the category of suspected persons, he held that, where the time between the two sets of actions relied upon, namely the earlier tampering with the cars and the later ones, to show loitering with intent, was as short as in the present case, it was not sufficient. It was not reasonable to classify the respondent as a suspected person on one part of his conduct and to treat the other part of his conduct as evidence of loitering and intent. It was a question of degree in each case, and this case was very near to the facts in *Hartley* v. *Ellnor* (1), which since *Ledwith* v. *Roberts* (2) could no longer be considered good law.

He therefore dismissed the information.

E. J. P. Cussen (with him *L. A. Byrne*) for the appellant. The learned magistrate was wrong in holding that there was no evidence to bring the appellant within the category of suspected persons, and that since the decision of the Court of Appeal in *Ledwith* v. *Roberts* (2) the case of *Hartley* v. *Ellnor* (1), which closely resembles the present case, is no longer law. The above mentioned cases are distinguishable on their facts and can stand together. *Hartley* v. *Ellnor* (1) shows that in order to convict a person accused under s. 4 of the Vagrancy Act, 1824, as amended, of being a suspected person loitering with intent, it must first be shown that he is at the time he commits the offence of loitering with intent already included in the category of suspected persons, and that for that purpose it is not necessary to show that he is so included by reason of a previous conviction or previous bad character. It is sufficient to show that at the time he is found loitering he had already become a suspected person. In the present case on facts similar to those in *Hartley* v.

(1) 117 L. T. 304.

(2) [1937] 1 K. B. 232.

Ellnor (1), there was a series of acts extending over some period of time in consequence of which he had become a suspected person, culminating on the same evening in a distinct act which was proved as constituting evidence of loitering with intent. It is not necessary that the accused should have become a suspected person on a day previous to the day of arrest ; it is only necessary that the acts constituting him a suspected person and those showing loitering with intent should be separate and distinct. In *Ledwith* v. *Roberts* (2) the same acts were relied on as constituting the plaintiffs suspected persons and persons loitering with intent, so that the cases are clearly distinguishable. *Hartley* v. *Ellnor* (1) was cited in *Ledwith* v. *Roberts* (2) and was apparently approved by the Court of Appeal.

Frank Milton for the respondent. The respondent's case rests entirely on the proposition that *Hartley* v. *Ellnor* (1) was overruled by *Ledwith* v. *Roberts* (2) and that the latter case governs the present one. In the latter case the Lords Justices agreed that a suspected person was not a person who was suspected of loitering with intent, but must already be in the class of suspected persons when charged with so loitering—in other words that no one could commit this offence but a suspected person. But Greene L.J., adverting to the fact that in *Hartley* v. *Ellnor* (1) the accused had been held to be a suspected person because seen by police-constables to tap the pockets of various persons in crowds over a period of forty minutes, said (3) that he did not agree with the reasoning of the Court. This charge is often preferred by the police in cases where they are satisfied that there is insufficient evidence upon which to found a charge of attempt, and for this reason it must be very carefully investigated. The prosecution must prove a course of conduct before the act of loitering, not, as here, one series of acts which are relied on to establish that the respondent was a suspected person and that he was loitering with intent. Is it to be said, for example, that a man who tries the door of a car at 12 o'clock, and at 12.1 o'clock tries the door of

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(1) 117 L. T. 304.
(2) [1937] 1 K. B. 232.
(3) [1937] 1 K. B. 254-5.

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another car, is constituted a suspected person by the first act and a person loitering with intent by the second act? The learned magistrate was right in holding that *Hartley* v. *Ellnor* (1) is no longer law.

LORD HEWART C.J. This is a case stated by the learned chief magistrate of the police-courts of the Metropolis. It arises in the following way. An information was preferred by the appellant, a detective constable of the Metropolitan Police, against the present respondent, charging him under s. 4 of the Vagrancy Act, 1824, with being a suspected person loitering in certain streets on February 27 of this year with intent to commit a felony. On April 6 the learned magistrate, having heard the evidence, dismissed the information, subject to this case. It is not necessary to reiterate in detail the material facts. It is apparent that it was established to the satisfaction of the learned magistrate that on February 27 last, at various times of the day, and in different places, the respondent was looking into and trying to open the doors of unattended motor-cars in the street. That course of conduct was observed again and again in the course of the evening. Particular mention is made of certain instances occurring at 9.45 P.M., 10.50 P.M. and afterwards at 11.5 P.M. on that evening. The respondent, on his part, denied that he had looked into any car or tried the door or opened the door of any car. The learned magistrate, having listened to the evidence and the arguments, found two facts. He found that the respondent was loitering in a public place on the day named, and that he did intend to commit a felony, but for reasons which he has set out in a very clear judgment he was of the opinion that he could not treat the respondent as being in the class of suspected persons, although it is quite obvious, when one reads the facts of this case and the judgment of the learned magistrate, that he would have come to the contrary conclusion had he not formed the opinion that a recent judgment in the Court of Appeal, *Ledwith* v. *Roberts* (2), had got rid of the judgment of this Court in the case of

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(1) 117 L. T. 304.

(2) [1937] 1 K. B. 232.

Hartley v. *Ellnor.* (1) He expresses his opinion in this way: "The conviction in this case"—there had been a previous conviction—"proved before me was between four and five "years ago. I refused to listen to his record antecedent to "that conviction on the ground that it was merely hearsay. "In my opinion there is not sufficient reason to justify my "holding that the accused at the time of his arrest was by "virtue of that conviction a suspected person. It seems "obvious that a man who becomes a suspected person by "reason of conviction for dishonesty cannot remain for ever "in the category of suspected persons merely by virtue of "that one conviction or what may have gone before it. "Where there is no evidence that he has not lived honestly "for a considerable period I think he must be regarded as "having ceased to belong to the category of suspected persons. "Four or five years seems to me an ample period from which "to infer this change in his status, and I hold that the "defendant is not a suspected person by reason of his previous "conviction proved before me." So far as that part of the judgment is concerned, no one is contesting it, but the crux comes in the second part, which is as follows: "The second "way in which it may be argued that he was at the time of "his arrest a suspected person is upon the evidence as to his "earlier conduct in tampering with cars on the same day." I pause to say that the facts found in the case make it clear that the tampering on that same day was carried on over a considerable period of time, and related to a somewhat protracted series of acts. The learned magistrate continues: "Without attempting to lay down any rule whether a course "of conduct on the same day would suffice to bring a man "against whom nothing else was known within the category "of suspected persons, I hold that where the time between "the two sets of actions relied upon (that is, earlier actions "making him a suspected person and then later actions used "to show that he was loitering with intent) is as short as in the "present instance, it is not reasonable to classify the accused "as a suspected person on one piece of his conduct and treat

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(1) 117 L. T. 304.

"the other part of his conduct as evidence of his illegal "operations. It is a question of degree in each case, but "where the time is very short it seems to me we get very "close to the state of affairs in *Hartley* v. *Ellnor* (1), a case "which since *Ledwith* v. *Roberts* (2) can no longer be considered as good law."

Now in my opinion the learned magistrate in holding that the decision in *Hartley* v. *Ellnor* (1), rightly understood, has ceased to be good law by reason of the decision in *Ledwith* v. *Roberts* (2) rightly understood, made an error in point of law. What is the point of the earlier case, *Hartley* v. *Ellnor* (1)? It came before this Court on a case stated by Birmingham justices, and in order to see precisely the point which was raised it may be well to reiterate the terms of the section which was being considered. Sect. 4 of the Vagrancy Act, 1824, provides, if one leaves out immaterial words, that every suspected person or reputed thief frequenting any street or any place of public resort with intent to commit a felony shall be deemed a rogue and vagabond. The evidence in the case is accurately summarized in the headnote as follows (1): "Ellnor was kept under observation by the police in a certain "part of the city of Birmingham on a certain day for a period "of about forty minutes. During that time he was seen "to mix with various crowds of people who were in the act "of boarding tramcars, and he was noticed to tap the pockets "of various individuals in the crowds. He was then arrested "by the police as a suspected person and charged before the "justices of Birmingham with being a rogue and vagabond "within the meaning of s. 4 of the Vagrancy Act, 1824. "There was no evidence of any previous offence," and the justices in those circumstances had dismissed the information subject to a case stated. The judgment of this Court was delivered by Avory J., who said this (3): "The justices "dismissed the charge on the ground that, in the absence of "any evidence before them showing that the respondent "had been previously convicted or that he was a person of

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(1) 117 L. T. 304.
(2) [1937] 1 K. B. 232.
(3) 117 L. T. 305.

"previous bad character, they were not entitled to find that "he was a suspected person within the meaning of the section "under which the charge was made against him. It was "upon the narrow point that I have mentioned that the "justices dismissed the charge, and"—these words I think are very important—" the only question which we are called "upon to decide is whether they were right in coming to the "conclusion that there must be evidence of a previous "conviction or of previous bad character in order to render "an individual a suspected person within the meaning of "the section of the statute under which these proceedings "were taken." Avory J. went on to say: "The justices "considered the phrases 'suspected person' and 'reputed "'thief' to be synonymous, but it is quite clear to us that "these words have not the same meaning. A person may "be a suspected person even though he is not a reputed thief, "and a person may be a suspected person on a particular "day, even though he has not been previously convicted, or "even though he has not had a reputation for bad character "in the past." A little later he said: "It was never "suggested that the respondent was a person from whose "known character an inference might be drawn that he was in "a certain place with the intention of committing a felony. "Reliance was placed, however, upon the evidence of the "particular acts done by him on the day in question from which "the Court might be asked to infer that he was in the "particular place with the intention of committing a felony." Finally Avory J. added (1): "The present proceedings, "however, were taken under the Vagrancy Act, 1824, and this "statute does not require proof that the person who is charged "as a suspected person is a person of ill fame and a reputed "thief unless, as counsel for the respondent has contended, "the mere use of the words 'suspected person or reputed thief' "imply that before he can be convicted of the offence there "must be evidence that, prior to the day in question, he had "the reputation of being a thief, or had been suspected before "that day, when he could be properly described as a

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(1) 117 L. T. 306.

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"suspected person. By whom must he have been suspected "before the day in question? Would the suspicion of one "individual before the day in question be sufficient to show "that he was a suspected person? We have not been "enlightened upon these points; but we are clearly of "opinion that in the present case there was ample evidence "before the justices to show that the respondent was in fact "a suspected person, and also that there was ample evidence "to render it possible for the inference to be properly drawn "that the respondent was frequenting Martineau Street on "the day in question with the intention of committing a "felony."

That decision, it seems to me, involves at least two things. It asserts, and nobody contests the view, that in order to come within the range of this section of the Vagrancy Act, 1824, a person must be a person who falls into a certain category or class. Here he falls into the class, not of reputed thieves, but of suspected persons, and the decision of this Court in *Hartley* v. *Ellnor* (1) clearly so held. The defendant who is to be held liable under s. 4 of the Act must be shown to be a person who belongs to the class of suspected persons, but—and this is the second point—it is not necessary that he should have acquired the status or have fallen into the category of suspected persons upon some day earlier than the day which is charged in the information. It is enough if acts antecedent to the act occasioning the arrest were of such a kind as to provoke suspicion. In *Hartley* v. *Ellnor* (1) the individual acts relied upon had extended over a period of something like forty minutes, and the climax of those acts was that the defendant was arrested as a suspected person loitering with intent to commit a felony. It was not that one and the same act gave rise (*a*) to the suspicion and (*b*) to the arrest; the suspicion which made the defendant a suspected person was suspicion arising from acts antecedent to the act occasioning the arrest. That seems to me to be the effect of the decision in *Hartley* v. *Ellnor* (1), and it gets rid of the proposition that in order to be a

(1) 117 L. T. 304.

suspected person who can loiter within the meaning of that section the accused must have got into the class of suspected persons on a day earlier than the day of the loitering.

The learned magistrate was evidently persuaded that the judgments, or some of the judgments, in the Court of Appeal in the case of *Ledwith* v. *Roberts* (1) had superseded or differed from the judgment of this Court in *Hartley* v. *Ellnor*. (2) I do not so read the judgments. It is very necessary in looking at that case to have regard to the facts which were then being considered, and the essential fact in *Ledwith* v. *Roberts* (1) was that one and the same act had been relied upon by the prosecution as giving rise to the suspicion which was to bring the defendants into the class of being suspected persons and as occasioning the arrest. There was one transaction and one transaction only. There was nothing in that case antecedent to the act which culminated in the arrest giving rise to suspicion against the particular persons concerned, and stress was laid upon the point that that which gives rise to the suspicion must be anterior to that which occasions the arrest. Greer L.J. says this (3): "They can only be apprehended without warrant if "they already are at the time of their arrest and imprisonment "suspected persons or reputed thieves. I do not think this "means that if the constable suspects the person whom he "apprehends he is entitled to arrest and imprison him without "warrant." In other words, there must be the necessary ingredient of antecedent facts giving rise to suspicion which brings the alleged offender into the category of suspected persons. He may not be put into the category of suspected persons solely by the act which causes him upon arrest to be charged with loitering as a suspected person with intent to commit a felony.

Our attention has been directed to other passages in the other judgments in that case. With all due respect, I do not think that any passages in those judgments when they are read in relation to the material which was then before the

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(1) [1937] 1 K. B. 232.

(2) 117 L. T. 304.

(3) [1937] 1 K. B. 245.

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Court, in any degree impair the effect of the judgment in *Hartley* v. *Ellnor* (1) on the subject-matter with which that judgment was dealing. It seems to me that the facts proved here clearly exhibit the two separate elements, first, antecedent acts occasioning suspicion and bringing the respondent into the class of suspected persons, and, secondly, an act which was the culminating point of a long series of acts, namely, the act that caused him to be arrested, and that that was the conclusion which the learned magistrate was apparently willing to draw but for some passages in the case in the Court of Appeal. (2) If that is so, then I think on the unimpaired strength of the judgment of this Court in *Hartley* v. *Ellnor* (1) the conclusion of the learned magistrate might well have been different from what it was.

I would add only one further word. Sect. 4 of the Act of 1824 seems to me to be limited and safeguarded in more ways than one. It is not merely necessary, as has been pointed out as well by this Court in *Hartley* v. *Ellnor* (1) as by the Court of Appeal in *Ledwith* v. *Roberts* (2), that a person who is a suspected person within the meaning of the section should be a person who falls within that class or category. It is important also to observe that the offence is where a suspected person or reputed thief frequents or loiters in any street, highway or place of public resort with intent to commit a felony. It seems to me that it would be difficult, almost to the point of impossibility, to contend, even for controversial purposes, that one single act could be held to show that a person was loitering or frequenting. The expression seems to involve the notion of something which to some degree, at any rate, is continuous or repeated, and the effect of such a word as "frequenting" or "loitering" therefore militates against the too harsh view in one aspect of the matter, or too easy view in another aspect of the matter, which might be taken of the meaning of this section.

In those circumstances it seems to me on the facts found by the learned magistrate, and regard being had to the nature

(1) 117 L. T. 304.

(2) [1937] 1 K. B. 232.

of the materials upon which he found those facts, that there is nothing in the decision of the Court of Appeal in *Ledwith* v. *Roberts* (1) to prevent the view of the law being taken which was expressed by this Court in *Hartley* v. *Ellnor.* (2) In my opinion this appeal succeeds, and the case ought to go back to the learned magistrate with that direction.

BRANSON J. I agree, and I only desire to add a few words as to the decision of the Court of Appeal in *Ledwith* v. *Roberts.* (1) The facts of that case were in no sense comparable with the facts in the case now before this Court. The case of *Hartley* v. *Ellnor* (2) only became material for examination in the Court of Appeal because it was used by the appellant as an authority for the proposition which is set out in the argument of Mr. Maxwell Fyfe (3), who said: "The allegation"—that is an allegation in the defence—"that the two police officers suspected on reasonable grounds "that the two plaintiffs were about to commit a felony was "a sufficient allegation that the plaintiffs were 'suspected "'persons' within the meaning of the statute," and for that contention *Hartley* v. *Ellnor* (2) was cited. My Lord has called attention to what *Hartley* v. *Ellnor* (2) really did decide, and without going through it again, all I need say is that *Hartley* v. *Ellnor* (2) was no authority for the proposition for which it was cited to the Court of Appeal in *Ledwith* v. *Roberts.* (1) The correctness of the decision was therefore not in question, and the somewhat different views upon it which were expressed by the Lords Justices were in fact obiter. My Lord has called attention to what they said, but there is one further passage in the judgment of Greer L.J. to which he did not refer, which I should like to quote, namely (4): "In my view this decision," referring to *Hartley* v. *Ellnor* (2), "was plainly right, because the evidence showed that at "the time of the arrest he had brought himself within the "description of a suspected person." This expresses my view in the present case.

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(1) [1937] 1 K. B. 232.
(2) 117 L. T. 304.
(3) [1937] 1 K. B. 237.
(4) Ibid. 250.

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For these reasons I agree with the judgment that has been pronounced, and have nothing further to add.

PORTER J. I agree. I can say what I want to say in a very few words. The learned chief magistrate in the opinion he gives, says that he was of opinion that the respondent could not be, not was not, a suspected person. As I understand it, for the reasons given by my Lord and Branson J., this Court has come to the conclusion, with which I agree, that the respondent could be classified as a suspected person. The reason, as I understand it, for which the learned magistrate gave that decision, was because he thought the case of *Hartley* v. *Ellnor* (1) had been overruled. Again this Court takes the view that this case has not been overruled, and is still of as much efficacy as it ever has been. For those reasons I agree with my Lord.

Solicitor for appellant: *Solicitor for Metropolitan Police.*
Solicitor for respondent: *Ronald J. Cassels.*

(1) 117 L. T. 304.

W. L. L. B.

BOWEN *v.* NORMAN.

1938
Jan. 17, 18.

Bastardy—Child of married woman—Maintenance order against husband—No provision that wife no longer bound to cohabit with husband—Subsequent conception of child—Presumption of legitimacy.

On October 17, 1935, the respondent, on the ground of desertion, obtained against her husband a maintenance order which did not contain a provision that she was no longer bound to cohabit with him. On June 20, 1937, she gave birth to a child, her husband being then still alive:—

Held, that proof of the maintenance order was not sufficient to rebut the legal presumption of access of the husband and of the legitimacy of the child born during the respondent's marriage.

Stafford v. *Kidd* [1937] 1 K. B. 395 distinguished.

CASE stated by the stipendiary magistrate for Miskin Higher, Glamorgan.

At a court of summary jurisdiction sitting at Mountain Ash, Glamorgan, on July 22, 1937, the stipendiary magistrate heard a complaint which had been laid by the respondent, Mary Jane Norman, against the appellant, Emrys Bowen, for that she (the respondent) was delivered of a bastard child on June 20, 1937, of which child she alleged the appellant to be the father.

On the hearing of the complaint it was proved or admitted: (*a*) that the respondent was lawfully married to Joseph Frederick Norman on April 22, 1930, and that Joseph Frederick Norman was alive at the date of the hearing of the complaint; (*b*) that on or about October 3, 1935, the respondent laid a complaint against her husband wherein she alleged that he had deserted her and her two infant children on or about September 8, 1935; (*c*) that the complaint for desertion was heard at Willesden Police Court on October 17, 1935, when the court made an order that Joseph Frederick Norman should pay the weekly sum of fifteen shillings for the maintenance of his wife and the weekly sum of seven shillings and sixpence for each of the two infant children, making a total sum of thirty shillings a week; (*d*) that the order did not contain a provision that the respondent be no longer bound to cohabit with her husband; and (*e*) that the respondent gave birth to a female child on June 20, 1937, and alleged the appellant to be the father.

No evidence was given on behalf of the respondent of non-access by her husband. The appellant's solicitor objected to the respondent giving evidence of intercourse with the appellant until she had called evidence of non-access by her husband, but the magistrate overruled that objection.

On behalf of the appellant it was contended (i.) that, as the order obtained by the respondent against her husband on October 17, 1935, did not contain a provision that she be no longer bound to cohabit with her husband, it was essential in law that the respondent should call independent evidence of non-access by her husband and that that evidence was a condition precedent to the respondent proceeding with her case; (ii.) that the respondent ought not to be allowed to give any evidence against the appellant before the preliminary issue of non-access was decided in her favour; (iii.) that no evidence was given on behalf of the respondent of non-access by her husband; (iv.) that as the respondent was a married woman, the child born on June 20, 1937, was presumed to be the child of her husband; and (v.) that, in the absence of evidence of non-access, the appellant could not be adjudged the putative father of the child referred to in the complaint.

The magistrate declined to accept the contentions made on the part of the appellant, holding that it was not necessary for the respondent to prove non-access by her husband by reason of the fact that she had obtained against him the order of October 17, 1935; that the rule of the presumption of the legitimacy of the child as laid down in *Russell* v. *Russell* (1) was not applicable; and that, therefore, the respondent could give evidence tending to bastardize her child. Being satisfied that the evidence of the respondent was true and was corroborated in some material particular to his satisfaction, he adjudged the appellant to be the putative father of the respondent's child and ordered him to pay to the respondent

(1) [1924] A. C. 687.

the sum of ten shillings a week until the child attained the age of sixteen years, and costs.

The appellant appealed against this order. In the case stated the magistrate drew the attention of the Court to *Stafford* v. *Kidd* (1), in which was quoted an extract from the judgment of Bateson J. in *Mart* v. *Mart* (2), in which it was said: "It has been decided that where there has been a "judicial separation it is presumed, in the absence of evidence "to the contrary, that there has not been access between the "spouses after the date of the decree, and that therefore, "where a child is born more than nine months after the "date of the decree, the presumption of legitimacy does not "arise. I think that a deed of separation has the same effect."

Graham Brooks for the appellant. *Stafford* v. *Kidd* (1), on which the magistrate relied, is distinguishable from the present case, because there there was a deed of separation between the parties which had been acted on. There was no such deed in the present case and no agreement to live apart. Separation is not to be presumed merely because a maintenance order has been made: per Hill J. in *Rimmer* v. *Rimmer*. (3) There is a clear distinction between maintenance orders which contain a non-cohabitation clause and those, like that in the present case, which do not, and different considerations apply. *Boston* v. *Boston* (4), which was also decided on similar facts, is directly in point in support of the appellant's contention.

W. Latey for the respondent. There is no substantial difference between a maintenance order and a separation order. A maintenance order implies separation, for a husband is bound by law to support a wife living with him. In the ordinary course of events, where a maintenance order has been made the parties do not become reconciled. That raises the presumption, which continues so long as the order is in force, that they have not become reconciled, and that presumption

(1) [1937] 1 K. B. 395.

(2) 42 Times L. R. 253; [1926] P. 24, 26.

(3) (1930) 46 Times L. R. 624 (note).

(4) (1928) 138 L. T. 647.

has not been rebutted by the appellant in the present case. Case law broadens from precedent to precedent, and just as in *Stafford* v. *Kidd* (1) the Court introduced an exception to the general rule, so in the present case the Court is entitled to introduce an exception, although there be no decided case where the Court has gone so far. A formal order of the Court that a husband shall, because of his desertion, pay an allowance to his wife has the same effect as an agreement between the parties to live apart in rebutting the presumption of access.

LORD HEWART C.J. stated the facts and continued: It appears that the magistrate took the view that the present case was similar to *Stafford* v. *Kidd* (1), but in my opinion there is not merely some difference but all the difference between the two cases.

In *Stafford* v. *Kidd* (1) it was held by this Court that the execution of a deed of separation, together with evidence that it had been acted on by the parties, was sufficient to rebut the legal presumption of access and of the legitimacy of a child born during marriage but conceived during a period when the spouses were living apart under the deed. The point which is taken in the present case is that a mere order of maintenance has the same effect as a deed of separation acted on by the parties. It is quite obvious that the two things are different. All that *Stafford* v. *Kidd* (1) decided was that, as had been previously laid down, the effect of a deed of separation, together with evidence that it had been acted on by the parties, was the same for the purposes with which we are concerned here as that of a decree of judicial separation.

In the present case, however, we have nothing but the fact that a maintenance order was made which did not contain a provision that the respondent was no longer bound to cohabit with her husband. There is a long line of authority—not merely *Rimmer* v. *Rimmer* (2), which was referred to in *Stafford* v. *Kidd* (1)—which shows that if we were to take the step which we are invited to take we should be going very far indeed. We are really being asked to make a new departure of an extremely far-reaching kind, and it is impossible to accept the argument that this mere order of maintenance is on the same footing as a decree or deed of separation which is shown to have been acted on by the parties.

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(1) [1937] 1 K. B. 395.

(2) 46 Times L. R. 624 (note).

In my opinion, the magistrate came to an erroneous conclusion in point of law and this appeal must be allowed.

BRANSON J. I agree.

HUMPHREYS J. I agree.

Appeal allowed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondent: *Bell, Brodrick & Gray, for W. J. Canton, Dowlais.*

G. F. L. B.

1938
Jan. 18.

EVANS *v.* CROSS.

Motor-car—Traffic sign—White line on highway—Failure to conform to indication given thereby—No offence—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 48, *sub-s.* 9 ; *s.* 49.

The appellant drove a motor-car on the wrong side of a white line which had been painted on the highway round a corner to indicate that traffic should keep to the near side of the road :—

Held, that the line painted on the highway was not a traffic sign within s. 48, sub-s. 9, of the Road Traffic Act, 1930, as being a " device for the guidance or direction of persons using " roads," and that, therefore, the appellant was not guilty, under s. 49, of the offence of failing to conform to the indication given by a traffic sign.

CASE stated by justices for Kirton and Skirbeck, Lincolnshire.

At a court of summary jurisdiction sitting at Boston, Lincolnshire, on July 14, 1937, an information was preferred by the respondent, Leslie Cross, an inspector of police, under the Road Traffic Act, 1930, s. 49, against the appellant, Arthur Evans, for that he on June 20, 1937, at Fishtoft, in Parts of Holland, Lincolnshire, then being the driver of a certain motor vehicle, to wit, a motor-car, on a certain road there called Wainfleet Road where a traffic sign indicating the route to be followed by traffic had been lawfully placed, unlawfully did fail to conform to the indication given by the sign, contrary to s. 49 of the Road Traffic Act, 1930. (1)

On the hearing of the information the following facts were proved or admitted :—

At 7.45 P.M. on Sunday, June 20, 1937, Police-constable Norman Dunn was on duty on Wainfleet Road, Fishtoft, at a place known as Burton Corner. There was a continuous white line round the corner and for some distance on both sides of it. The line was five inches wide and was painted on the roadway, and an arrow was painted at each end of it to indicate the route to be taken by traffic. The police-constable saw a "Ford" saloon motor-car being driven round Burton Corner from the direction of Skegness towards Boston at about twenty-five miles per hour. When the car was on the corner the officer saw a "Morris" two-seater motor-car, driven by the appellant, pull out from behind the "Ford" motor-car and begin to overtake it. The near side wheels of the "Morris" car ran along the white line continuously round the corner, placing the whole of the car on the outside of the white line.

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(1) By Road Traffic Act, 1930, s. 48, sub-s. 1 : ". . . . A highway authority may cause or "permit traffic signs to be placed "on or near any road in their "area."

By s. 48, sub-s. 9 : ". . . . The "expression ' traffic sign,' includes "all signals, warning sign posts, "direction posts, signs, or other "devices for the guidance or "direction of persons using roads. ". . . ."

Sect. 49 provides that a person who " fails to conform to the "indication given by " a traffic sign shall be guilty of an offence.

The appellant's solicitor agreed that the white line was of the proper colour and width.

The justices were of opinion that in view of the words "signs, or other devices" contained in s. 48, sub-s. 9, of the Road Traffic Act, 1930, and of Regulations 20, sub-s. (ii.), and 21, sub-s. (i.), of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, the white line in question was a "traffic sign" and that an offence had been committed by the appellant under s. 49 of the Road Traffic Act, 1930. They, therefore, convicted the appellant and he was fined 1*l*.

The appellant appealed.

Fox-Andrews for appellant. The justices were wrong. It is not an offence under s. 49 of the Road Traffic Act, 1930, to drive on the wrong side of a white line painted on a highway, since such a line is not a "traffic sign" within s. 48, sub-s. 9, of the Act. The only signs covered by that sub-section are sign posts and signs of a similar nature thereto. It is true that Regulation 20 of the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933, provides that "lines may be placed on "roads for indicating— . . . . (ii.) the course to be taken "by traffic at road junctions, corners and curves," but that permissive provision does not make it an offence to ignore a white line.

The respondent did not appear.

LORD HEWART C.J. To bring what happened in the present case within the scope of the Road Traffic Act, 1930, it must be made to appear that the line painted on the highway was a device, and, therefore, a traffic sign, within the meaning of s. 48, sub-s. 9, of the Act, and that the appellant failed to conform to the indication given by that sign within s. 49. In my opinion the word "device" in s. 48, sub-s. 9, refers to things ejusdem generis with "signals, warning sign posts, "direction posts, and signs"—which words precede "device" in the sub-section—and no one would dream of saying that a painted line on the highway was of the same character as a sign post or direction post or a sign of that nature.

When one turns to the Regulations which have been made in pursuance of the Act—Regulations which it is not without importance to observe are called the Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933—one finds that a large part of the document is occupied by diagrams of what would ordinarily be called signs or sign posts. Regulation 2 provides that "the traffic signs which a highway "authority may cause or permit to be placed on or near any "road in their area for the purposes specified in the schedule "hereto shall conform as to size and type with the indications "given in the diagrams set out in the said schedule." The schedule, which consists of many pages of diagrams, sets out such signs as "Cross roads," "Level Crossing," "Bend" (in road), "Steep Hill," "Road Junction," "School," "Narrow "Bridge," "No Through Road," and so on. Regulation 20 provides: "Lines" (not "signs") "may be placed on roads "for indicating— . . . . (ii.) the course to be taken by traffic "at road junctions, corners and curves." In my opinion, a white line so placed on a highway is not a traffic sign within s. 48, sub-s. 9, of the Act of 1930 so as to expose a driver who fails to conform to it to penalties for an offence under s. 49. Such lines are intended to be, and are, helpful indications of the road which may best be followed.

If the Court were urged so to interpret the Act and the Regulations as to bring failure to observe a white line within the penal provisions of the Act because there was no other way of dealing with a case where mischief had resulted, or might have resulted, from non-observance of the line, the Court might be astute to find in the words of the Act and Regulations something which would cover what had been done. But it is perfectly obvious that where a person drives a motor-car in such a way as not to conform to a white line he may well be exposing himself, in the particular circumstances of the actual case, to a prosecution for driving without due care and caution or even for dangerous driving. It is, therefore, unnecessary to adopt any meaning which strains the penal provisions of s. 48, sub-s. 9, and s. 49. The justices sought to give an undue extension to the provisions of the Act and Regulations and so came to an incorrect determination in point of law. The appeal must be allowed.

Branson J. I agree.

Humphreys J. I agree.

Appeal allowed.

Solicitors for appellant: *C. W. Evans, for Nelson & Jackson, Lincoln.*

G. F. L. B.

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HORNCHURCH URBAN DISTRICT COUNCIL *v.* WEBBER AND OTHERS.

Local Government—Roads and streets—Private street works—Expenses—Apportionment to be settled with regard to benefit to be derived from works—Non-inclusion by urban authority of premises not fronting street—Objection—Direction by justices that such premises should be included—Power of justices—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *s.* 10.

An urban authority, acting under ss. 6 and 10 of the Private Street Works Act, 1892, resolved that the expenses of certain works which were to be carried out should " be apportioned on " the premises fronting, adjoining, or abutting on such street " . . . . regard being had to the greater or less degree of benefit " to be derived by any premises from such works." The authority did not resolve, under the last part of s. 10, to include any premises which did not front, adjoin, or abut on the street. Objections having been taken under s. 7 of the Act to the proposals of the authority by certain owners of premises affected thereby, the justices who heard the objections under s. 8 of the Act directed that certain premises which did not front, adjoin, or abut on the street should be included in the provisional apportionment:—

Held, that the statute empowered the urban authority alone, as a matter of discretion and policy, to decide whether or not premises which did not front, adjoin, or abut on the street should be included in the apportionment, and the justices, in the absence of a resolution by the authority that such premises should be included, had no jurisdiction on the hearing of objections to the apportionment to amend the apportionment by directing that they should be included.

Bridgwater Corporation v. *Stone* (1908) 72 J. P. 487; *Oakley* v. *Merthyr Tydfil Corporation* [1922] 1 K. B. 409, applied.

CASE stated by Essex justices.

At a court of summary jurisdiction sitting at Romford, Essex, on April 13 and 20, 1937, certain objections lodged by the respondents in pursuance of s. 7 of the Private Street Works Act, 1892 (1), to the proposals of the appellants to do

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(1) By the Private Street Works Act, 1892, s. 6: ". . . . the "expenses incurred by the urban "authority in executing private "street works shall be apportioned "(subject as in this Act mentioned) on the premises fronting, "adjoining, or abutting on such "street. . . . "

By s. 7: ". . . . any owner of "any premises shown in a provisional apportionment as liable "to be charged with any part of "the expenses of executing the "works may . . . . object to the "proposals of the urban authority "on any of the following grounds ". . . . (*e*) that any premises certain private street works with respect to a street known as Harold Court Road, in the urban district of Hornchurch, Essex, were heard. The statements appearing in the notices of objection as the grounds on which the objections (so far as those objections were relevant to the present case) were made, were: (*a*) "that there has been some material informality, defect or error in or in respect of the resolution, "notice, plans, sections or estimate"; (*b*) "that the Essex "County Council should have been inserted in the provisional "apportionment as owners of the Harold Court Sanatorium"; (*c*) "that the Essex County Council, as chief users of the road "and according to the degree of benefit, should be included "in the apportionment"; and (*d*) "that the proposed works "are unreasonable and that the estimated expenses are "excessive."

On the hearing of the objections the following facts were proved or admitted:—

The Private Street Works Act, 1892, had been adopted by the appellants and was in force in the urban district of Hornchurch. The appellants were the urban sanitary authority for the district. Harold Court Road was a street within the meaning of the Act and was situated in the appellants' district. The appellants by resolution dated October 15,

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"ought to be excluded from or "inserted in the provisional "apportionment."

By s. 10: "In a provisional "apportionment of expenses of "private street works the apportionment of expenses against the "premises fronting, adjoining, or "abutting on the street or part of "a street in respect of which the "expenses are to be incurred shall, "unless the urban authority "otherwise resolve, be apportioned according to the frontage "of the respective premises; but "the urban authority may, if they "think just, resolve that in settling "the apportionment regard shall "be had to the following considerations; (that is to say) (*a*) "The greater or less degree of "benefit to be derived by any "premises from such works; (*b*) "The amount and value of any "work already done by the owners "or occupiers of any such premises. They may also, if they "think just, include any premises "which do not front, adjoin, or "abut on the street or part of a "street, but access to which is "obtained from the street through "a court, passage, or otherwise, "and which in their opinion will "be benefited by the works, and "may fix the sum or proportion "to be charged against any such "premises accordingly."

1935, resolved as follows: "That in pursuance of the Private "Street Works Act, 1892, the following street and part of "a street within the sanitary district of the council be "sewered, levelled, paved, metalled and made good and "provided with proper means of lighting, and that the expenses "of such works be apportioned on the premises fronting, "adjoining, or abutting on such street and part of a street, "regard being had to the greater or less degree of benefit "to be derived by any premises from such works, and that the "surveyor do prepare in conformity with this resolution "as respects each of the said streets a specification of the "above-mentioned works with plans and sections, an estimate "of the probable expenses of the works, and provisional "apportionments of the estimated expenses among the "premises liable to be charged therewith under the Act, "namely, Harold Court Road, running in a southerly direction "from Colchester Road to the Railway Bridge." The appellants' surveyor duly prepared a specification of the works referred to in the resolution with plans and sections, an estimate of the probable expenses and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the Act. In settling the apportionment, the appellants had regard to the greater or less degree of benefit to be derived by any premises from the works. The specification, plans, sections, estimate and provisional apportionment comprised the particulars prescribed in Part I. of the Schedule to the Act, and were duly submitted to the appellants and approved by them by resolution dated February 16, 1937, which was duly published in the manner prescribed in Part II. of the Schedule to the Act. Within seven days after the date of the first publication thereof, copies were duly served on the owners of the premises (including the respondents) shown as liable to be charged in the provisional apportionment. The Essex County Council were not included in the apportionment, they having no premises fronting, adjoining, or abutting on the street the subject of the resolutions. The appellants had not at any time resolved to include in the provisional apportionment any premises access to which was obtained from the street through a court, passage, or otherwise within the meaning of s. 10 of the Act. Immediately beyond Harold Court Road and communicating directly with it, was an occupation road. There was no apparent line of demarcation between Harold Court Road and the occupation road, except that a railway bridge crossed the street at the point of connection. The premises known as Harold Court Sanatorium and owned by the Essex County Council obtained access to the Harold Court Road by the occupation road. Harold Court Road constituted the main means of approach to the sanatorium and was generally used by the Essex County Council as well as by other persons.

The justices, being of opinion that, having regard to all the circumstances of the case, including the user of the street with respect to which the appellants had resolved to do private street works, by persons going to and from the premises of the Essex County Council by means of the occupation road, and the distinct benefit which the county council would derive from the said works, directed that the premises of the Essex County Council be included in the provisional apportionment and that that provisional apportionment be amended accordingly by inserting the premises with a liability of 444*l.*, being 12½ per cent. of the estimated cost, and by reducing pro rata the amounts charged to the other frontagers. The justices further directed that a notice be given by the appellants to the Essex County Council so that the council might appear before them and be heard if they so desired as to such alleged benefit or such alleged liability, and they adjourned the hearing pending the service of the notice by the appellants.

The appellants appealed, the question on which the opinion of the Court was desired being whether the justices had jurisdiction to amend the provisional apportionment by inserting the premises of the Essex County Council.

S. G. Turner K.C. and *Percy Lamb* for the appellants. The justices had no power to amend the apportionment by directing the inclusion in it of the sanatorium. The effect of ss. 6 and 10 of the Private Street Works Act, 1892, is that the urban authority is given the exclusive power and discretion to resolve (i.) to do private street works and (ii.) the method in which the expenses of the works should be apportioned. In the absence of a resolution by the urban authority the apportionment is to be without qualification according to the frontage of premises fronting, adjoining, or abutting on the street: per Lord Hewart C.J. in *Rex* v. *Minister of Health. Ex parte Aldridge.* (1) By resolution, however, the urban authority can direct that in settling the apportionment regard shall be had to the degree of benefit derived by any premises from the works or the amount and value of any work already done by the owners or occupiers of any such premises: s. 10 (*a*), (*b*). Furthermore, in certain circumstances, the authority can include premises which do not front, adjoin, or abut on the street. In the absence of a resolution by the authority that in settling an apportionment regard is to be had to the benefit to be derived by any premises from the works or the amount and value of any work done by the owners or occupiers of premises, justices have no jurisdiction, on the hearing of objections, to amend the apportionment in respect of benefit or work done: *Bridgwater Corporation* v. *Stone* (2); per Lord Hewart C.J. in *Rex* v. *Minister of Health. Ex parte Aldridge* (3); *Birmingham Corporation* v. *Mother-General of the Convent of the Sisters of the Charity of St. Paul.* (4) [They also referred to *Chester Corporation* v. *Briggs.* (5)] Similarly, where, as in the present case, the authority has not resolved to include premises which do not front, adjoin, or abut on the street, the justices have no power to amend the apportionment by directing premises of that class to be included. Sect. 10 of the Act leaves the question whether premises which do not front the street shall be included to the discretion of the authority as completely as it so leaves the question whether in settling the apportionment regard should be had to benefit or work done. The justices cannot, in effect, force the authority to pass a resolution to a certain effect, nor can they pass one for the authority, nor can they amend a resolution which the authority has not passed. Sect. 7 (*e*) of the Act must be read in conjunction with and subject to that basic principle. [They also referred to *Mansfield Corporation* v. *Butterworth.* (1)]

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(1) [1925] 2 K. B. 363, 369.
(2) (1908) 72 J. P. 487.
(3) [1925] 2 K. B. 363, 370.
(4) (1927) 44 Times L. R. 31.
(5) [1924] 1 K. B. 239.

Geoffrey Hutchinson for respondents. There was no need for the urban authority to pass a resolution to include premises which did not front the street before the justices could make the order which they did. A resolution by the authority is only necessary to get rid of the two primary statutory requirements (i.) apportionment against premises fronting the street and (ii.) such an apportionment according to the frontage of the premises, and once that has been done the authority can decide without any resolution to include premises which do not front, or the justices, on the hearing of objections, can introduce that matter. *Oakley* v. *Merthyr Tydfil Corporation* (2) shows that no formal resolution is necessary to include premises which do not front the street, and throughout the statute, where the Legislature has intended that a resolution should be passed by the authority, they have used precise language to express that intention. In the last part of s. 10 mention of a resolution is deliberately omitted, because when an authority determines whether it is just to include premises which do not front the street it is acting in a judicial and not an administrative capacity, and in those circumstances it was thought undesirable that the jurisdiction of the justices should be ousted. The scheme of ss. 6 and 10 is to draw a distinction between the administrative and the judicial acts of the authority, and the effect of the decisions is that in so far as the actions of the authority are administrative the jurisdiction of the justices is excluded, but that once those actions become judicial they are made subject to the jurisdiction of the justices. The authority acts in an administrative capacity so long as it is applying the general principle that an apportionment shall be according to frontage,

(1) [1898] 2 Q. B. 274.

(2) [1922] 1 K. B. 409.

but its functions become judicial when it departs from the mere application of that general principle.

LORD HEWART C.J. stated the facts and continued: The question which we have to decide here seems to me to be a fundamental question with regard to the true interpretation of this important Act of Parliament. The Act provides that in certain circumstances an urban authority may resolve to do certain works with respect to any street or part of a street. Thereupon it is provided that a specification is to be made, an estimate of the probable expenses is to be prepared, and a provisional apportionment of the expenses among the premises liable to be charged therewith is to be suggested by the surveyor. It is provided by s. 7 that certain objections may within a limited time be made by written notice served on the urban authority. By s. 8 it is provided that the urban authority, after the expiration of a certain time, "may apply to a court of summary jurisdiction to "appoint a time for determining the matter of all objections "made as in this Act mentioned." The Court which hears those objections "may quash in whole or in part or may "amend the resolution, plans, sections, estimates, and "provisional apportionments, or any of them, on the "application either of any objector or of the urban authority," and the Court may adjourn and, if it thinks fit, direct further notices to be given.

By the clear terms of s. 6, sub-s. 1, it is provided that where an urban authority resolve to sewer, level, pave, etc., some street or part of a street, the expenses incurred by the urban authority in executing those private street works "shall "be apportioned (subject as in this Act mentioned) on the "premises fronting, adjoining, or abutting on such street "or part of a street." In other words, the section prescribes in the clearest possible language a general rule which is to be followed unless something happens. That "unless something "happens" is indicated in the words "subject as in this Act "mentioned." What do those words mean? They refer by anticipation to the provisions of s. 10, which provides for the apportionment of expenses "according to the frontage "of the respective premises." In other words, applying the universal rule which has been laid down by s. 6, this section goes on to say not only in the normal standard case shall the apportionment be by frontage but it shall be by mere admeasurement. Then come the modifications which explain why the words "subject as in this Act mentioned" appear in s. 6: "but the urban authority may, if they think just" —an expression which recurs significantly enough a little later in the section—"resolve that in settling the apportion-"ment regard shall be had to the following considerations; "(that is to say) (*a*) the greater or less degree of benefit to be "derived by any premises from such works; (*b*) the amount "and value of any work already done by the owners or "occupiers of any such premises."

Up to that point it seems to me to be quite manifest that the section is dealing with apportionment of expenses on premises fronting, adjoining, or abutting on the street, and it is giving express power to the local authority in the exercise of their discretion to resolve if they think just that apportionment by mere admeasurement of the frontage shall not be conclusive, but that, while the apportionment is still based on frontage, regard shall be had to the greater or less degree of benefit to be derived by particular premises which front, adjoin or abut on the street, and also to the amount and value of any work already done by the owners or occupiers of any such premises. So far it seems to me that there is really no possibility of error. Then come these words: "They"—that is the urban authority—"may also, if they "think just"—that expression being repeated from the place it occupied in the sentence referring to the resolution—"include any premises which do not front, adjoin, or abut "on the street or part of a street, but access to which is "obtained from the street through a court, passage, or "otherwise, and which in their opinion will be benefited by "the works, and may fix the sum or proportion to be charged "against any such premises accordingly." The relation of that part of the section to what has gone before seems to me

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to be reasonably clear, and certainly in my experience it has always been interpreted as if it were reasonably clear—namely, that just as the urban authority as a matter of discretion and policy are permitted to vary the normal mode of apportionment by mere admeasurement of frontage to the extent of taking into account the benefit to be derived by particular premises or the amount and value of work done by the owners or occupiers of particular premises, so also the urban authority are empowered in the exercise of their discretion and by resolution to include premises which do not front, adjoin or abut on the street.

The matter would not, I think, be open even to a brief argument if the word " resolve " had been repeated in the last part of s. 10, but, looking at the collocation of the words in that part of the section, I have no doubt about the meaning. The urban authority may, if they think just, resolve that in settling the apportionment under s. 10 regard shall be had to the provisions of paras. (*a*) or (*b*) of the section. They may also, if they think just, include any premises which do not front, adjoin, or abut on the street. In my opinion, the section contemplates a resolution of the urban authority, that such premises should be included, whether made uno flatu or at a different time, and that view was undoubtedly expressed in this Court by Lord Trevethin C.J. in *Oakley* v. *Merthyr Tydfil Corporation.* (1) In that case the question was whether the authority had resolved to include the premises which were therein referred to and it was said that although there was no express resolution so to include them, the resolution which approved the provisional apportionment relating to them was sufficient. Lord Trevethin said this : "It must be borne in mind that two resolutions are contemplated by the Act. There is the resolution under s. 6, which "is the initiation of the proceedings. It will be observed "that this first resolution is one which need not be published, "and which concerns the council itself. It may well be "that at the time they pass such a resolution a council are "not aware of any premises which are not fronting, adjoining,

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(1) [1922] 1 K. B. 409, 422.

"or abutting on the street, but access to which is obtained "from the street through a court, passage, or otherwise. "The surveyor, however, when set in motion has duties "under s. 6, sub-s. 2, and he may draw the attention of the "council to such houses as above mentioned by including "them in his specification estimate and provisional apportionment. It then becomes the right of the council to pass a "second resolution under s. 6, sub-s. 3, approving the "provisional apportionment, which includes such houses, "but this they can only do if they think it just to include "such houses. This second resolution was passed in the "present case, and from the fact that the council have "included the houses in Awelfryn Terrace it must be assumed "that they thought it just to do so. We think it would be "more in conformity with the provisions of the Act that "the resolution should state expressly that the council "'think it just to include' such houses. For the purposes "of persons objecting this is the really important resolution, "because it has to be published so that objection may be "made." That was a unanimous and considered decision of the Court, which consisted of Lord Trevethin, Sankey J., and Acton J. That case seems to me, even if it stood alone, as it does not, to make it perfectly plain that the question whether premises which do not front, adjoin or abut on the street are to be included is a question of policy and discretion for the local authority. The authority may also, if they think just, include such premises, as they may, if they think just, resolve that the apportionment by mere admeasurement shall be supplemented and corrected by reference to paras. (*a*) and (*b*) of the section.

A similar view of the construction of the section has been referred to, and frequently assumed, in other cases. So, for example, in *Bridgwater Corporation* v. *Stone* (1), where it was held that "in the absence of a resolution by "the urban authority under s. 10 of the Private Street Works "Act, 1892, that the apportionment of the expenses of making "up a street is to be otherwise than according to frontage,

(1) 72 J. P. 487.

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"the justices have no jurisdiction under s. 8, sub-s. 1, of the "Act on the hearing of objections to the provisional "apportionment to reduce the apportionment in respect of "the degree of benefit to be derived by any premises, or of "the amount and value of any work already done by the "owners or occupiers." In that case it was found as a fact that the appellants did not resolve in settling the provisional apportionment that regard should be had to any consideration other than the frontage of the premises fronting, adjoining or abutting on the street. Notwithstanding the absence of that resolution, the justices believed themselves to be empowered to alter and amend the provisional apportionment as if that resolution had been passed. Lord Alverstone C.J., delivering a judgment in which Bigham J. and Walton J. concurred, said: "It seems to us that "Mr. Naldrett"—Mr. Naldrett appeared for the appellants— "is right in saying that the authority to decide whether the "apportionment is to be based on any other consideration "than that of frontage, is not the magistrates but the urban "authority who, under s. 10, can pass a resolution that "the apportionment shall be otherwise than according to "frontage. That that was meant to be left to the urban "authority is also confirmed by s. 7 (*f*) which refers to "the objections that an owner may take. [His Lordship "read s. 7 (*f*).] That indicates that that objection can "only be raised where there has been a resolution that the "apportionment is to be otherwise than by frontage. "Therefore, the justices had no jurisdiction to cut down the "frontage to the hypothetical figure of sixteen feet; and, "therefore, they exceeded their jurisdiction. In the absence "of a resolution, which the urban authority might have "passed, the respondents' remedy is by appeal to the Local "Government Board under s. 268 of the Public Health Act, "1875." It is quite true that that decision is in terms a decision only that it is a matter for resolution by the urban authority if they think just to depart, by referring to paras. (*a*) and (*b*) of s. 10, from apportionment according merely to the admeasurement of the frontage. In my opinion, mutatis mutandis the words equally apply to what is provided in the section as to the power of the urban authority, if they think just, also to include premises which do not front, adjoin or abut. I shall not enter in detail into the other cases, but there are passages in *Chester Corporation* v. *Briggs* (1); *Rex* v. *Minister of Health*; *ex parte Aldridge* (2); and *Birmingham Corporation* v. *Mother-General of the Convent of the Sisters of the Charity of St. Paul* (3) which, in my opinion, support that view.

The ingenious and able argument which has been presented to us by Mr. Hutchinson for the respondents is founded on the fact that in setting out the possible heads of objection to proposed works, a matter dealt with in s. 7 of this statute, the Legislature has provided, among other things, that the objector may say, if he thinks fit, that certain premises ought to be excluded from or inserted in the provisional apportionment (s. 7 (*e*)), and the argument is that those are apt words to enable an objector to say that the apportionment, if it had been properly made, would have had regard to premises which do not front, adjoin, or abut on the street. In my opinion that argument is a fallacy. The words of s. 7 (*e*) have an obvious meaning with reference to the ordinary case where apportionment takes place according to frontage, whether it be according to mere admeasurement or to measurement of frontage supplemented and corrected by regard to benefit received or work done. I cannot get from that possible head of objection any ground for believing that, after the statute has used the words "they"—that is the urban authority—"may also, if they think just, include" a wholly new class of premises, to wit, premises which do not front, adjoin, or abut on the street, side by side with premises which do, the justices have jurisdiction in effect to order the urban authority to come to the conclusion to which in the justices' view they ought antecedently to have come—namely, that it was just to include that new class of premises. It seems to me that that is to give the go-by to the plain meaning of the words in the last paragraph of s. 10 of this statute: "They "may also, if they think just, include," following closely as they do on the words, "may, if they think just, resolve that in "settling the apportionment regard shall be had . . . ."

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(1) [1924] 1 K. B. 239.

(2) [1925] 2 K. B. 363.

(3) 44 Times L. R. 31.

The argument really is, in my opinion, an endeavour to rewrite this section, and it involves, as the course of the argument has shown, the remarkable conclusion that, if a local authority are minded to depart from the normal rule of apportionment according to frontage by mere admeasurement and to have regard to one of the other matters permitted by the section, they must have regard to all. The argument is that by deciding, if they do decide, to have regard to the degree of benefit received or to the value of work done, they have rid themselves of and have torn up the universal rule about the basis of apportionment, and, willy-nilly, have opened every door. If the authority decide that it is right to have regard to benefit received, then they must have regard to value of work done, and if they decide to have regard to either of those things in respect of premises which front, adjoin, or abut on a street, then ipso facto they must include, whether they think it just or not, premises which do not front, adjoin or abut on the street. Whatever may be the merits of such a provision—and I have the gravest doubts about them—I cannot find it lurking within the four corners of s. 10. On the contrary, that construction seems to me to be a contradiction of the plain language of the section, and the argument would never have been possible but for the inclusion in s. 7, under the conceivable heads of objection, of para. (*e*), "that any "premises ought to be excluded from or inserted in the "provisional apportionment." In my opinion, those words clearly mean that, the basis of the apportionment being what it is according to the resolution of the local authority, an error has been made in the exclusion or in the insertion of particular premises, but the whole controversy is within the four corners of the provisional apportionment on the basis resolved on by the urban authority. It does not open the door to the justices to say: "Although the urban authority "have not arrived at the opinion that this other course is "just, we will tell them that they ought to have done so, "and we will amend this apportionment as if they had."

Mr. Hutchinson laid great stress on the expression in the last paragraph of s. 10: "They may also, if they think just, include any "premises which do not front, adjoin, or abut on the street." He says that the words "if they think just" import an element of quasi-judicial deliberation and determination. But exactly the same words appear above, where it is provided that "the "urban authority may, if they think just, resolve that in "settling the apportionment regard shall be had" to benefit or value of work done. There is clear and express authority on the point that, if they refrain from passing a resolution of that kind, no Court can tell them that they must do so or behave as if they had done so. I have no hesitation in expressing the view myself that, although it is highly desirable that administrative acts should not be permitted to encroach on the field of judicial decision, it is impossible, on these words in this section, to say that judicial decision can operate to compel an administrative act to be done which has not been done or to treat the matter as if it had been done. In my opinion, when one looks at the clear words of the section and at the cases which have been decided with reference to it, it is apparent that these justices misread the section and gave directions and caused amendments to be made which they had no jurisdiction to give or to make. I think, therefore, that this appeal ought to be allowed.

BRANSON J. I agree, but as I have arrived at that conclusion with some hesitation I think it right that I should express in my own words the reasons which have brought me to that opinion.

It is clear that under the sections some right of appeal, some power of altering decisions, has been given by statute to the justices, and the real question is to what extent that power goes. If one looks at s. 8 one finds the powers of the justices expressed in the widest terms: "The Court may quash "in whole or in part or may amend the resolution, plans, "sections, estimates, and provisional apportionments, or "any of them, on the application either of any objector or of "the urban authority." It would be difficult to conceive of more complete powers of dealing with the matter in hand than the powers so expressed to be given, but then one must, I think, look at s. 7 to see whether that section has not put limits to the powers conferred by s. 8. One finds there that this appeal can only be taken on notice of objections and the provision that those objections must be on one or other of the grounds set forth in paras. (*a*) to (*f*) of that section. It has been argued that in this particular case the objector brings himself within the express language of para. (*e*) of s. 7. He is objecting that certain premises, to wit, the premises of the Essex County Council, have been excluded from the provisional apportionment, and unless there is something in the framework of these sections, or unless one is bound by authority, it would appear that the statute has given power to raise the very objection which we find in the present case.

With regard to that, I find first of all that this Court in *Bridgwater Corporation* v. *Stone* (1) gave a decision which seems to show that, in spite of the arguments which had been stated with regard to the ambit of the appeal, no appeal to the justices was possible except in circumstances which do not apply to the present case. It is said there that unless the urban authority have under s. 10 passed a resolution resolving that in settling the apportionment regard shall be had to some consideration other than mere frontage, the justices cannot direct that greater or less degree of benefit or the amount and value of work already done by owners or occupiers of premises shall be allowed to affect the apportionment. That leads one to examine the sections afresh to see whether there is not some criterion which is decisive of the present case. Giving the greatest possible weight to the authority of *Bridgwater Corporation* v. *Stone* (1), and on consideration, I have come to the conclusion that there is, and that the matter may be stated in the following way. By s. 6 and s. 10, read together, the Act provides for a statutory method of apportioning the expenses of works

(1) 72 J. P. 487.

done under those sections, and if the matter simply remains without any resolution of the urban authority, there is a statutory method of apportionment which nobody can alter. If that method is in operation, all that any objector can say is that it has not been properly applied—in other words, that some premises which have a frontage and therefore ought to be included have been left out, or that some premises have been included which have no frontage and ought therefore to be excluded. If the urban authority choose to exercise the discretion given to them by the words of s. 10 saying that they may, if they think just, resolve that in settling the apportionment regard shall be had to the considerations embodied in paras. (*a*) and (*b*) of the section, then objections that those considerations have not been properly regarded can be made. That is provided for by para. (*f*) of s. 7. I think that it is very material to bear in mind that the Legislature thought it necessary to give express power to frame an objection on that ground, and to limit it to cases "where "the provisional apportionment is made with regard to other "considerations than frontage as hereinafter provided." Exactly the same considerations seem to me to apply to the other discretion which is given to the urban authority—namely, the discretion, if they think it just, to include premises which do not front, adjoin or abut. If they take that course and exercise that discretion, anybody who is affected can appeal to the justices and say that their property does not receive the necessary access or for any other reason does not come within the class of property over which this discretion has been given to the urban authority. But it seems to me that it would not be right for us to say that, because, as in the present case, the urban authority have resolved that the apportionment shall have regard to the greater or less degree of benefit to be derived by any premises from the works, that in any way authorizes the justices to exercise for the urban authority their discretion under the remaining portions of the section and to order that premises which do not front, adjoin or abut on the street shall be included in the apportionment.

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HORNCHURCH U. D. C. v. WEBBER.

Branson J.

For these reasons the doubts with which I had regarded this case during a considerable part of the argument have been resolved, and I think that, not only upon the authority of *Bridgwater Corporation* v. *Stone* (1), and the other cases that have been referred to by my Lord, but also treating the matter as res integra, this appeal should be allowed.

HUMPHREYS J. I agree.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for L. G. Peake, Romford.*

Solicitors for respondents: *Candler, Sykes & Dore, for Leonard Gray & Co., Chelmsford.*

G. F. L. B.

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(1) 72 J. P. 487.

ELDORADO ICE CREAM COMPANY, LIMITED *v.* CLARK.

ELDORADO ICE CREAM COMPANY, LIMITED *v.* KEATING.

1938
Jan. 20.

Shops—Sunday Trading—" Shop open for serving of customers "—" Place where retail trade or business carried on "—Warehouse used for storage of goods—Box-tricycle from which goods sold to customers—Shops (Sunday Trading Restriction) Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 53), *s.* 11, *sub-s.* 1 ; *s.* 13.

The appellants were convicted by justices of offences against ss. 11 and 12 of the Shops (Sunday Trading Restriction) Act, 1936, relating to Sunday employment at a " shop " of which they were the occupiers. The appellants occupied a warehouse for the storage of ice-cream from which on Sunday supplies were given to employees to be sold by each of those employees to members of the public by retail from a movable box-tricycle :—

Held, that the warehouse was not a shop which was open for the serving of customers on Sunday within s. 11, sub-s. 1, of the Act, nor was it a place where retail trade or business was carried on within s. 13 so that the provisions of the Act extended to it as if it were a shop ; that the box-tricycle was not a " place " within s. 13 ; and that, therefore, the appellants had been wrongly convicted.

ELDORADO ICE CREAM COMPANY, LIMITED *v.* CLARK.

Case stated by justices for the Parts of Lindsey, Lincolnshire.

At a court of summary jurisdiction sitting at Scunthorpe, Lincolnshire, on July 28, 1937, three informations were preferred by the respondent, Arthur Clark, under the Shops (Sunday Trading Restriction) Act, 1936, against the appellants, the Eldorado Ice Cream Company, Ld., for that they in May, 1937, (*a*) then being the occupiers of a certain shop, namely, a warehouse situate at the back of 227 Frodingham Road, Scunthorpe, which was kept open for the serving of customers on Sunday, unlawfully did fail to comply with the provisions of s. 12 of the Act in that they did not keep a record in the prescribed form of the names of and hours worked by all persons employed about the business of the said shop on Sunday who were entitled to any holidays prescribed by s. 11 of the said Act (1) ; (*b*) then being the occupiers of a certain shop, namely, a warehouse situate at 227 Frodingham Road, Scunthorpe, from which a certain business in the sale of ice-cream was then carried on, unlawfully did contravene the provisions of s. 11 of the Act in that a certain shop assistant named Harold Fussey, who was employed about the business of the shop on more than three Sundays in May, 1937, did not receive in respect of his employment on each of those Sundays a whole holiday on a day other than that of his statutory half-holiday; and (*c*) then being the occupiers of a certain shop situate at the back of 227 Frodingham Road, Scunthorpe, from which a certain business in the sale of ice-cream was then carried on, unlawfully did contravene the provisions of s. 11 of the Act in that a certain shop assistant named Harold Fussey was employed about the business of the shop on more than three Sundays in the month.

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(1) By the Shops (Sunday Trading Restriction) Act, 1936, s. 11, sub-s. 1 : ". . . . No person "shall be employed on Sunday "about the business of a shop "which is open for the serving of "customers on that day unless "the following requirements are

On the hearing of the three informations it was admitted or proved that (i.) the appellants were the occupiers of a warehouse situate at the back of 227 Frodingham Road, Scunthorpe; (ii.) the respondent was the inspector appointed by the council of the borough of Scunthorpe (being the local authority under the Shops Acts, 1912 to 1936) and duly authorized to take proceedings in that behalf; (iii.) the appellants carried on the business of selling ice-cream and occupied the warehouse for the storage of ice-cream from which supplies were daily given to Fussey to be sold by him from a movable barrow; (iv.) the appellants employed Fussey to sell the ice-cream by retail to members of the public from the movable barrow which Fussey in the course of his employment pushed along a route specified by the appellants in or around the borough of Scunthorpe; (v.) Fussey only visited the warehouse to fill the barrow in the mornings and to account to his employers in the evening; (vi.) the appellants employed Fussey as aforesaid for more than

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"complied with"—[the requirements enacted provide for extra holiday time during the week for persons employed on Sunday and that a person employed for more than four hours on any Sunday shall not be employed about the business of a shop on more than two other Sundays in the same month.]

By s. 13: ". . . . the provisions of this Act shall extend to "any place where any retail trade "or business is carried on as if "that place were a shop. . . ."

four hours on each and every Sunday during May, 1937; (vii.) Fussey did not receive a whole holiday on any week-day in respect of any of the Sundays in May on which he was employed; (viii.) the appellants did not keep any record of the names of or the hours worked by the persons employed by them on Sundays at the warehouse.

The majority of the justices were of the opinion that the warehouse was a " place " within the meaning of s. 13 of the Shops (Sunday Trading Restriction) Act, 1936, and they accordingly held that the offences had been proved and convicted the appellants on each of the informations.

The appellants appealed.

ELDORADO ICE CREAM COMPANY, LIMITED *v.* KEATING.

Case stated by Wiltshire justices.

At a court of summary jurisdiction sitting at Marlborough on October 18, 1937, four informations were preferred by the respondent, Charles Keating, against the appellants, the Eldorado Ice Cream Company, Ld., being three informations under the Shops (Sunday Trading Restriction) Act, 1936, and one information under the Shops (Sunday Trading Restriction) Act, 1936, the Shops Act, 1912, and the Factory and Workshop Act, 1901, alleging respectively as follows: (i.) " for that you at "the parish of Avebury in the county of Wilts unlawfully did "employ G. S. Porter for more than four hours on Sunday, "July 4, 1937, and not giving (*sic*) him a whole day holiday in "the week beginning on that Sunday or in the previous week, "contrary to s. 11 of the Shops (Sunday Trading Restriction) "Act, 1936" ; (ii.) " for that you at the parish of Preshute in the "county of Wilts unlawfully did employ P. G. Cleverly for more "than four hours on Sunday, July 4, 1937, and not giving (*sic*) "him a whole day holiday in the week beginning on that Sunday "or in the previous week, contrary to s. 11 of the Shops (Sunday "Trading Restriction) Act, 1936" ; (iii.) " for that you on September 9, 1937, in the county of Wilts did unlawfully fail to "keep in the prescribed form and in the prescribed manner a

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Eldorado Ice Cream Co. v. Clark. Same v. Keating.

"record of the names of and the hours worked by all the persons "employed about the business of the places where the retail trade "or business of the said company is carried on on Sunday who "are entitled to any holiday prescribed by s. 11 of the Shops "(Sunday Trading Restriction) Act, 1936, and of the respective "days of the week upon which those persons receive those "holidays, contrary to s. 12 of the Shops (Sunday Trading "Restriction) Act, 1936"; (iv.) "for that you on September 9, "1937, in the county of Wilts by your servant, O. B. Whitfield, "unlawfully did fail to produce to the said Charles Keating a "certain document which you were required to produce in "pursuance of s. 119 of the Factory and Workshop Act, 1901, "to wit, a record as required by ss. 12 and 13 of the Shops "(Sunday Trading Restriction) Act, 1936, of the names of and "the hours worked by all the persons employed about the "business of the places where the retail trade or business of the "said company is carried on on Sunday who are entitled to any "holidays prescribed by s. 11 of the Shops (Sunday Trading "Restriction) Act, 1936, and of the respective days of the "week upon which those persons receive those holidays, "contrary to s. 14 of the Shops (Sunday Trading Restriction) "Act, 1936, s. 13 of the Shops Act, 1912, and s. 119 of the "Factory and Workshop Act, 1901."

On the hearing of the informations it was admitted or proved that (i.) the respondent was an inspector for the purposes of the Shops Acts, 1912 to 1936, duly appointed and authorized by the council of the county of Wilts (being the local authority under the said Acts); (ii.) the appellants on July 4, 1937, employed one G. S. Porter and one P. G. Cleverly for more than four hours and for a period during the day those two persons worked on behalf of the appellants in the parishes of Avebury and Preshute respectively in the manner in para. (v.) hereof set out; (iii.) neither of those two persons received a whole holiday in the week beginning on July 4, 1937, or in the week previous thereto; (iv.) no record of such employment as aforesaid was kept by the appellants and on September 9, 1937, one O. B. Whitfield, employed by the appellants, failed to produce such a record to the respondent; (v.) each of the two

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persons, G. S. Porter and P. G. Cleverly, on July 4, 1937, in the course of his employment, pedalled a box-tricycle on the public thoroughfares in and around Marlborough and stopped from time to time in the neighbouring villages and sold ice-cream therefrom by retail to passers-by.

The justices were of opinion that each of the two box-tricycles from which sales were so made was a "place" where retail trade or business was carried on within s. 13 of the Shops (Sunday Trading Restriction) Act, 1936, and, therefore, was to be treated as a shop, and that each of the two employees, G. S. Porter and P. G. Cleverly, was employed about the business of such a "place" and entitled to holidays as prescribed by s. 11 of the Act. They, accordingly, held that the offences had been proved and convicted the appellants on each of the four informations.

The appellants appealed.

Robert Ives for the appellants. The justices were wrong in both cases. In the first case the warehouse was merely a reservoir or storehouse for goods which were to be sold elsewhere. It was neither a shop which was open for the serving of customers on Sunday within s. 11, sub-s. 1, of the Act, nor was it a place where retail trade or business was carried on within s. 13. The appellants, therefore, could not be guilty of the offences charged against them.

In the second case, a box-tricycle from which goods are sold is not a place where retail trade or business is carried on within s. 13. A movable chattel cannot be a "place" within the ordinary and natural meaning of the word, and there is nothing in these sections to give it a special meaning. In the Form of Record of Sunday Employment and Holidays, in the Schedule to the Shops Regulations, 1937 (St. R. & O. 1937, No. 271), there is a space for the address of the shop where the employment takes place. That clearly contemplates a fixed place of employment. If ss. 11 and 13 applied to a box-tricycle and such similar movable trading appliances (e.g., a pedlar's tray), they would apply the provisions of the Act to all retail trade. Where the Legislature wishes to deal with street trading it does so in terms: e.g., Children and Young Persons Act, 1933, ss. 20, 30.

George Bankes for the respondent, Arthur Clark. The warehouse was "open for the serving of customers" within s. 11. It was open to enable the appellants' employee to obtain the goods which he was to sell elsewhere, and the fact that the sale of the goods was to take place elsewhere did not alter the position, nor did it prevent the warehouse being a place where retail trade or business was carried on within s. 13. The serving of customers need not actually take place at the "shop," a word which in the Shops Acts has an extended and artificial meaning: *Wallace* v. *Dixon*. (1) The employee, Fussey, was, therefore, employed "about the business of a "shop" within s. 11, sub-s. 1, and s. 12, and the appellants were guilty of the offences charged against them.

Vernon Gattie for respondent, Charles Keating. A box-tricycle is not a shop, but it is a place where retail trade or business is carried on within s. 13, which provides that such a place must be treated as if it were a shop. The fact that it is movable makes no difference. "Shop" is an elastic term and can include such a temporary and crude structure as a board lying on trestles: *Smith (W. H.) & Son* v. *Kyle*. (2)

LORD HEWART C.J. stated the facts and continued: The material sections of the Shops (Sunday Trading Restriction) Act, 1936, seem to be reasonably easy to construe. It appears that the words in s. 11, "shop which is open for the "serving of customers," form a kind of compound substantive. The words might be joined to each other by hyphens, and it is essential, if a prosecution such as those in the present case is to succeed, that the persons in respect of whom the prosecution is launched should be employed about the business of a place of that nature. The provisions of s. 11 are extended by s. 13.

The contention in *Eldorado Ice Cream Co., Ld.* v. *Clark* is that on a true construction of ss. 11 and 13 the premises, which are repeatedly described in the case stated as a warehouse, nevertheless come within the definition of a shop in s. 11 as

(1) [1917] 2 I. R. 236.

(2) [1902] 1 K. B. 286.

extended by s. 13. In my opinion, that contention is wrong and the contention of the appellants is right—namely, that the employee referred to in the charges was not "employed "about the business of a shop" inasmuch as the warehouse was not "open for the serving of customers," within s. 11, nor was the warehouse a "place" within the meaning of s. 13, because no retail trade or business was carried on at it. The true function of the warehouse is made plain by the facts found by the justices. It was in the nature of a depot or reservoir to which the commodity dealt in was taken in bulk, afterwards to be divided into retail quantities and sold at various points in the streets. As it is stated in the case, "the appellants occupied the warehouse for the storage of "ice-cream from which supplies were daily given to Fussey "to be sold by him from a movable barrow." No retail trade was carried on at the warehouse. The sale by retail of the ice-cream was at the movable barrow. The warehouse was a mere storing place, and there is nothing in these sections which brings a mere storehouse within their scope. This appeal ought, therefore, to be allowed and the convictions quashed.

In *Eldorado Ice Cream Co., Ld.* v. *Keating* a more ingenious and subtle argument has been advanced. The contention is boldly made, not that the warehouse was a "shop" or that the particular spot at which at a given time a box-tricycle was to be found was a "shop," but that each of the movable box-tricycles itself was a "place" within the meaning of s. 13 "where retail trade or business was carried on."

The Act of 1936 begins with a provision about the closing of shops and the serving of customers in shops, and s. 11 contains the words: "No person shall be employed on "Sunday about the business of a shop which is open for the "serving of customers on that day" unless certain requirements are complied with. It becomes clear, when one looks at the whole scheme and purpose of the Act, that it is essential that the place where the employment is carried on, to be a "place" within s. 13, must be either a shop or premises akin to a shop. Sect. 13 does not provide that any retail sale, wherever it may be made, shall come within the meaning of the Act. It does not prohibit the transaction of selling by retail. To re-read s. 11 as the argument seeks to extend it is to produce some such result as that "no person shall be "employed on Sunday about the business of a box-tricycle "which is open for the serving of customers on that day unless "the following requirements are complied with." But the terms of s. 13 are that the "place" referred to in that section is "any place where any retail trade or business is carried on," not merely the apparatus by means of which, or the thing through which, any trade is carried on. So, in proviso (*b*) to s. 13, are found the words "persons wholly or mainly em-"ployed in connection with the retail trade or business carried "on thereat," that is, at a shop.

Throughout these sections one finds words which connote defined and fixed locality and position and one also finds in the Schedule to the Shops Regulations, 1937, made under the Act, that the Form of Record of Sunday Employment and Holidays to be kept under s. 12 of the Act requires (inter alia) that the address of the shop or place should be stated. What would be the address of the box-tricycle ? Part of Mr. Gattie's argument seemed to treat as synonymous the expression "the box-tricycle is a place" and "the box-tricycle is at "a place." With all respect to its author, his contention seems to me to belong to that large class of arguments described by an ancient philosopher as the kind of argument which no man would dream of advancing except to maintain a controversial position.

In my opinion, this appeal also should be allowed.

BRANSON J. I agree.

HUMPHREYS J. I agree.

Appeals allowed.

Solicitor for appellants : *Wilfrid Ellis.*

Solicitors for respondent, Arthur Clark : *Beachcroft, Wakeford May & Co., for Town Clerk, Scunthorpe.*

Solicitors for respondent, Charles Keating : *Sharpe, Pritchard & Co., for W. L. Bown, Trowbridge.*

G. F. L. B.

C. A.

1937

July 14, 15.

JOSSELSON *v.* BORST.

GLIKSTEN (THIRD PARTY).

Assignment of covenant — Validity — Assignment by one only of several joint covenantees — Notice of assignment to one only of two joint covenantors, the other being bankrupt—Assignment of covenant to pay liquidated sum and indemnify against claim sounding in damages, whether assignment of a debt or thing in action—Assignment of benefit of covenant with cross-covenant to indemnify assignor, whether nugatory in effect—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 77, *sub-s.* 1 (*c*) ; *s.* 81, *sub-s.* 1 ; *s.* 136, *sub-s.* 1 ; *Second Schedule, Part IX.—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 118.

By an assignment made in 1927 a lessee assigned the lease to a company, which covenanted with the lessee to pay the rent and to perform the lessee's covenants. In 1930 the company went into voluntary liquidation, and two liquidators were appointed. By an agreement for sale made in February, 1931, the company agreed to sell the lease to an intended purchaser. By an assignment made in December, 1931, the company, acting by the liquidators and at the direction of the intended purchaser, assigned the lease to a second assignee, and the intended purchaser and the second assignee entered into covenants with "the company "and the liquidators" to pay rent becoming due under the lease, to perform the lessee's covenants, and to keep them indemnified against all claims in respect thereof. In 1934 the second assignee became bankrupt. By an assignment made in July, 1936, "the company acting by the liquidators" assigned to the original lessee the benefit of the aforesaid covenants in the assignment of 1931 by the intended purchaser and the second assignee, and the original lessee released the company and the liquidators from all claims under the covenants by the company in the former assignments, except so far as necessary to enable him to enforce the covenants and indemnities assigned to him; and he covenanted to indemnify them against all liability in respect of any claim by him against them under the covenants by the company in the former assignments and in respect of the assignment of 1936. Notice of this last assignment was not given to both the covenantors, namely the intended purchaser and the second assignee, but only to the former. In August, 1936, the lessor, as plaintiff, recovered judgment in an action for rent against one of the original lessees as defendant. Subsequently the defendant lessee recovered judgment in a claim by him against the intended purchaser, who had been joined as a third party to the action, for the amount recovered by the plaintiff against the defendant, on the ground that by virtue of the assignments of 1931 and 1936 the third party was liable to indemnify the defendant against the plaintiff's claim. On appeal by the third party against the last mentioned judgment :—

Held, by the Court of Appeal, disallowing the respective contentions of the third party to the contrary :—

1. That the assignment of 1936 was not rendered ineffective as an assignment to the defendant of the covenants by the third party in the earlier assignment of 1931 by reason of the fact that it was not made by all the joint covenantees, namely the company and the two liquidators, but only by the company, inasmuch as by s. 81 of the Law of Property Act, 1925, a covenant made with two or more jointly, after the passing of the Act, shall be construed as being made also with each of them :

2. That the assignment of 1936 was not rendered ineffective as an assignment to the defendant of the covenants by the third party in the earlier assignment of 1931 because of notice of assignment under s. 136 of the Law of Property Act, 1925, not having been given to both the joint covenantors, namely the third party and the bankrupt second assignee, but only to the former of them, inasmuch as by s. 118 of the Bankruptcy Act, 1914, where a bankrupt is a contractor jointly with any person, such person may be sued in respect of the contract without the joinder of the bankrupt, and in view of that provision it was sufficient to give notice of the assignment of the contract to the person liable to be sued thereon :

3. That the assignment of 1936 in assigning to the defendant the covenants by the third party in the earlier assignment of 1931 was an assignment of a " debt or other legal thing in action " effectual in law to pass the legal right thereto within the meaning of s. 136, sub-s. 1, of the Law of Property Act, 1925 :

4. That on the true construction of the assignment of 1936 its later provisions did not render it nugatory by releasing the company from the obligation of assigning to the defendant the covenants of the third party : and

5. That the assignment of 1936 was valid and effective.

In re Perkins. Poyser v. *Beyfus* [1898] 2 Ch. 182, 190 observations applied.

Judgment of Singleton J. affirmed.

APPEAL from the judgment of Singleton J. in an action tried by him without a jury.

By an indenture of lease dated May 7, 1923, and made between Harry Josselson (thereinafter called " the lessor ") of the one part, and Theodore Borst and Benjamin Borst, who carried on together the business of dealers in ply-wood, timber and veneers (thereinafter called " the lessees "), of the other part, It was witnessed that in consideration of the rents thereinafter reserved and of the covenants by the lessees thereinafter contained the lessor demised to the lessees the premises 38 Barbican in the City of London to hold from March 25, 1923 for the term of twenty-one years, the lessees paying therefor during the term to the lessor the yearly rent of 550*l.* by equal quarterly payments, and also paying by way of additional rent such sum or sums of money as the lessor might pay for insuring the premises against fire or accident, and the lessees covenanted to pay the rent and additional rent at the times and in the manner aforesaid.

T. Borst and B. Borst formed a limited company called Borst Brothers, Ld., to take over a part of their business.

In 1927 T. Borst and B. Borst decided to part, and an arrangement was made by which T. Borst was to keep the wholesale side of the business and B. Borst the retail side; and No. 38 Barbican was one of the shops which were to go to B. Borst's side of the business.

B. Borst then formed a limited company called B. Borst, Ld.

By an indenture of assignment dated December 9, 1927, and made between B. Borst and T. Borst of the one part and B. Borst, Ld., of the other part, it was witnessed that in consideration of the covenants therein contained on the part of B. Borst, Ld., B. Borst and T. Borst assigned to B. Borst, Ld., the premises comprised in the lease to hold for the residue of the term, and B. Borst, Ld., covenanted with B. Borst and T. Borst: "(*a*) To pay the rent reserved "by and henceforth to become payable under the lease; "(*b*) to perform and observe all the covenants in the lease "contained and henceforth on the part of the lessee to be "performed and observed."

On October 3, 1930, B. Borst, Ld., went into voluntary liquidation, and David Cavill Evans and Frank Henry Agar were appointed liquidators thereof for the purpose of the winding-up.

By an agreement for sale dated February 11, 1931, and made between B. Borst, Ld., in liquidation by its said liquidators of the one part and Lazarus Gliksten of the other part, it was agreed that that company would sell and that L. Gliksten would purchase certain property including the said lease in consideration of the purchaser making the payments, giving the guarantees and complying with the terms and conditions therein specified.

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By an indenture of assignment dated December 1, 1931, and made between B. Borst, Ld., in liquidation of the first part, the liquidators of that company of the second part, L. Gliksten of the third part and Reginald Benjamin Borst, timber merchant, a son of B. Borst, of the fourth part, after reciting the above mentioned instruments, the voluntary liquidation of the company and the appointment of the liquidators, and that L. Gliksten had requested and authorized the company and the liquidators to assign the lease to R. B. Borst, it was witnessed that, in consideration of the sum of 10*s.* paid by L. Gliksten to the liquidators, the company, acting by the liquidators and at the direction of L. Gliksten, assigned to R. B. Borst the said lease to hold for the residue of the term thereof. Clause 3 was as follows: "The purchaser" [L. Gliksten] "and the assignee" [R. B. Borst] "hereby covenant with the company and the liquidators that they will at all times from the date hereof duly pay all rent becoming due under the lease, and perform and observe all the covenants, agreements, and conditions therein contained and thenceforth on the part of the lessees to be performed and observed, and also will until the company is finally dissolved and until the liquidators are relieved from all liability, keep them indemnified against all actions, claims and demands whatsoever in respect of the rent reserved by and the covenants contained in the lease and on the lessees' part to be paid performed and observed."

On December 4, 1934, R. B. Borst was adjudicated bankrupt.

In 1935 rent was in arrear under the lease, and claims were about to be made by H. Josselson, the lessor, against T. Borst for the arrears.

Thereupon, T. Borst asked the liquidators of B. Borst, Ld., for an assignment of that company's rights against L. Gliksten.

On June 3, 1936, the liquidators made an application by a summons in the voluntary winding-up of the company bringing the matter of T. Borst's application before the Registrar of the Companies Court. L. Gliksten was represented at the hearing of that application, though it did not appear that any part in the proceedings was taken on his behalf.

The registrar made an order that the liquidators should be at liberty to enter into an assignment in the form of a draft assignment which had been amended during the proceedings and finally approved by him.

On July 3, 1936, H. Josselson, as plaintiff, brought the present action against T. Borst, as defendant, claiming 1030*l.* for rent and insurance premiums due under the lease.

By an indenture of assignment dated July 13, 1936, and made between B. Borst, Ld., in liquidation of the first part, the liquidators of that company of the second part, Borst Brothers, Ld., of the third part, and T. Borst, the defendant, of the fourth part, being an assignment in the form approved by the registrar, after reciting, among other things, the above mentioned lease and assignments including the covenants of indemnity contained in them respectively, and, further, that the company and the liquidators had agreed with Borst Brothers, Ld., and T. Borst, the defendant, to assign to them respectively the benefit of the said recited several covenants of indemnity in consideration of the respective releases and indemnities thereinafter contained, it was witnessed, among other things, as follows :—

" 4. In pursuance of the said agreement and in consideration "of the covenant by " T. Borst " hereinafter contained the "company acting by the liquidators hereby assigns to " T. Borst " All and singular the full benefit and advantage of "the several covenants for the payment of the rent reserved "by and performance of the lessee's covenants and indemnities "by the said L. Gliksten and R. B. Borst contained as hereinbefore recited in the hereinbefore mentioned assignments " . . . . "

5. T. Borst " hereby releases the company and the liquidators and each of them and their and each of their estates "and effects from all claims and demands under or in respect "of the covenants on the part of the company contained or "implied in the assignments " of (among others) December 9, 1927, " save and except in so far as is necessary to enable " T. Borst " to enforce the covenants and indemnities hereinbefore assigned to " T. Borst.

6. T. Borst "hereby covenants with the company and the "liquidators and severally with each of them that he . . . . "will indemnify the company and the liquidators and each of "them and each of their estates and effects against all liability "in respect of any present or future claim of" T. Borst "and "the said B. Borst or either of them against the company and the "liquidators or any of them under or in respect of all or any "of the said covenants by the company with" T. Borst "and the said B. Borst contained or implied in the said "assignments" of (among others) December 9, 1927, "and "against all other liability (if any) in respect of the assignment "contained in clause 4 hereof. . . . ."

T. Borst, the defendant, gave notice dated July 15, 1936, "to L. Gliksten and whomsoever else it might concern that "by an assignment dated July 13, 1936 . . . . the company "acting by the liquidators . . . . assigned to" T. Borst, the defendant, "the full benefit and advantage of the several "covenants for the payment of rent and the performance "of the lessee's covenants and indemnities by the said "L. Gliksten and R. B. Borst contained in the assignments" of December 1, 1931.

T. Borst, the defendant, was not in a position to dispute his liability, and the plaintiff recovered judgment for 1030*l.*

Pursuant to leave granted by the Master, T. Borst, the defendant, issued a third-party notice dated August 4, 1936, to L. Gliksten (hereinafter called "the third party"), giving him notice that the defendant claimed from him indemnity against the plaintiff's claim and other relief.

On September 21, 1936, the defendant delivered a statement of claim to the third party in which on the grounds there set forth he claimed (i.) a declaration that he was entitled to be indemnified by the third party under the assignment of 1936 against the judgment for 1030*l.* recovered by the plaintiff against the defendant; (ii.) judgment for 1030*l.*; (iii.) judgment for costs; and (iv.) damages for breach of the assignment of December 1, 1931.

On October 8, 1936, the third party delivered his defence to the statement of claim of the defendant, in which he stated (inter alia) (para. 6) that the benefit and advantage of the covenants and indemnities given by him in the assignment of December 1, 1931, were not assignable in law; (para. 7) that further or alternatively he would contend: (i.) that the covenants of the third party relied on in the statement of claim were made with the company B. Borst, Ld., and its liquidators and with no other company or persons, (ii.) that upon the true construction of these covenants the liability of the third party thereunder remained in force only so long as the company and its liquidators were liable in respect of the rents and covenants under the lease, (iii.) that the liabilities of the company and its liquidators in respect of the rents and covenants under the lease came to an end as from December 1, 1931, upon which date the company acting by its liquidators assigned the premises by assignment to R. B. Borst for the residue of the term created by the lease, and that the liability of the third party also came to an end as from December 1, 1931, (iv.) that the defendant as purported assignee of the benefit of the covenants of the third party could not acquire any greater rights than those of the company and its liquidators the assignors of the defendant, and (v.) that the statement of claim disclosed no cause of action; (para. 8) that the third party did not admit any of the allegations in the statement of claim; (para. 9) that the third party admitted that he had not paid the rent or insurance premiums referred to in the statement of claim; and (para. 10) that further or in the alternative the third party would contend that the damages claimed were too remote.

On February 1 and 5, 1937, the claim in the action by the defendant against the third party was tried by Singleton J. without a jury.

On the latter date the learned judge delivered judgment, in which after stating the facts substantially as above set out and fully discussing the questions of law raised before him, he came to the conclusion that the defendant was entitled to judgment on his claim for an indemnity against the third party for the amount of the judgment recovered by the plaintiff in the action against the defendant, namely 1030*l.*,

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together with the amount of certain costs paid by the defendant to the plaintiff, and of the defendant's costs of the action.

The third party gave notice of appeal.

Roland Burrows K.C. and *Sir G. W. H. Jones* for L. Gliksten, third party. The judgment of Singleton J. adjudging that the third party, L. Gliksten, should pay to the defendant, T. Borst, 1030*l.* and costs was wrong and should be reversed, and judgment entered for the third party, on four distinct and separate grounds. First, the assignment of 1936, under which the defendant claims to enforce the covenant against the third party, is invalid, inasmuch as it was made by only one of three joint covenantees. The covenant which the assignment of 1936 purports to assign, namely the covenant by L. Gliksten and R. Borst as covenantors in the earlier assignment of 1931, is both at law and in equity a covenant made with three joint covenantees, namely the company, B. Borst, Ld., and each of the two liquidators, and is not a several covenant with each of them, and the general rule is that under such a covenant all the covenantees must join in suing or being sued upon the covenant or in assigning their rights under it: see *Slingsby's Case* (1); *Sumner* v. *Powell* (2); *Sorsbie* v. *Park.* (3) The Law of Property Act, 1925, s. 81, sub-s. 1, no doubt provides that a covenant made with two or more jointly to do any act to them or for their benefit, when made after the Act, shall be construed as being made with each of them. But that provision does not apply to the present case, because this covenant, which bound the covenantors to pay the rent and perform the other lessees' obligations under the lease, was not to do any act to the covenantees or for their benefit, but for the benefit of the landlord: see per Rowlatt J. in *Schmidt* v. *Van der Veen.* (4) Here the third party is bound as covenantor to the company and the liquidators as joint covenantees, and these covenantees could only assign to the defendant the benefit of their

(1) (1587) 5 Co. Rep. 18b.
(2) (1816) 2 Mer. 30.
(3) (1843) 12 M. & W. 146.
(4) (1915) 31 Times L. R. 214, 215.

covenants and indemnities against the third party by an assignment which gave the defendant one and the same cause of action against them all: see *Pirie* v. *Richardson.* (1) The so-called assignment of 1936 is an assignment by one only of these three persons, namely the company, and it does not therefore assign to the defendant the benefit of the covenant by the third party. Secondly, the assignment of 1936 is invalid, because notice of it was given to only one of the two parties whose joint liability it purported to assign. By their covenant in the previous assignment of 1931 the third party and R. B. Borst covenanted as joint covenantors to pay the rent and perform the other tenant's obligations under the lease. In order that an assignment should be a valid legal assignment under s. 136 of the Law of Property Act, 1925, it is necessary that notice of the assignment be given to the debtor or other person liable, and, where the thing to be assigned is a joint covenant, it is submitted that notice of the assignment must be given to each of the joint covenantors. As notice of the assignment of 1936 purporting to assign the joint covenant of 1931 was given to only one of the two joint covenantors, namely to the third party and not to R. B. Borst, the assignment was invalid. This case is different from that of an equitable assignment of a joint liability where it would seem that notice of assignment may be given to one of the parties liable in respect of his share or as agent for all: see per Lord Esher M.R. in *Read* v. *Brown.* (2) The Bankruptcy Act, 1914, s. 118, no doubt provides that, where a bankrupt is a joint contractor with any other person, that person may sue or be sued without joining the bankrupt. That section, however, while enabling the other contracting party to enforce the contract without joining the bankrupt, does not dispense with the need for giving him notice of an intended assignment of the contract.

[SLESSER L.J. referred to *Addison* v. *Cox.* (3)]

Here, as notice of the assignment of 1936 was given to only one of the two joint covenantors, that assignment was ineffective.

(1) [1927] 1 K. B. 448.
(2) (1888) 22 Q. B. D. 128, 132.
(3) (1872) L. R. 8 Ch. 76.

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Thirdly, the assignment of 1936 is not a valid legal assignment, because it is not an assignment of any "debt or other legal thing "in action" within the meaning of s. 136, sub-s. 1, of the Act of 1925. That assignment assigns the covenant of 1931 by which the covenantors bind themselves to pay rent and perform the lessee's obligations under the lease, and to indemnify the covenantees. The first part of that covenant means that if the covenantors do not pay the rent to the landlord and the covenantees are obliged to pay it, the former will pay to the latter the amount of the damage he thereby sustains. The latter part obliging the covenantors to indemnify also sounds in damages. Even if the latter obligation be a debt, the covenant as a whole is one and indivisible, and the fact that part of it sounds in damages prevents the obligation under it from being a debt assignable under the Act: *Western Wagon and Property Co.* v. *West.* (1) The present case is distinguishable from *In re Perkins. Poyser* v. *Beyfus* (2) and *Ellis* v. *Torrington* (3), because here the assignee had no interest in the estate of the bankrupt covenantor, which remained vested in the trustee in bankruptcy, but at most a right of action against him sounding in damages which could not be assigned. Fourthly, the assignment of 1936 is on its true construction a nullity. By clause 4 the company assigns to the defendant as assignee the full benefit of the covenant by the third party as covenantor. But by clause 5 the defendant as assignee releases the company from all claims and demands under the covenant on the part of the company save in so far as is necessary to enable the assignee to enforce the covenant; and by clause 6 the defendant as assignee covenants to indemnify the company against any claim by himself against the company and against all liability in respect of clause 4. The effect of clauses 5 and 6 is to deprive clause 4 of any value and to render the assignment ineffective.

W. P. Spens K.C. and *Ernest Hancock* for the defendant, respondent.

(1) [1892] 1 Ch. 271.
(2) [1898] 2 Ch. 182.
(3) [1920] 1 K. B. 399.

[GREER L.J. The Court does not require to hear argument for the respondent on the first point.]

As to the second point, it was sufficient to give notice of the assignment to the third party, and it was unnecessary that it should be given to the other covenantor who was bankrupt. The test is against whom would the assignor of the covenant have been entitled to claim the debt or thing in action if there had been no assignment under s. 136 of the Law of Property Act of 1925. It is clear that under s. 118 of the Bankruptcy Act, 1914, the assignor could have sued the third party on the covenant without joining the joint covenantor, who was bankrupt, as a co-defendant, and he could therefore assign his right to do so to the defendant under s. 136 of the Act of 1925 on notice to the third party only. As to the third point, the assignment of 1936, being an assignment of a covenant to pay rent, was an assignment of a debt or other legal thing in action within the meaning of s. 136, sub-s. 1, of the Act of 1925. As to the fourth point, the assignment of 1936 is not a nullity. It was settled by conveyancing counsel under the supervision of the Registrar of Companies, and it is therefore presumably a valid deed. That assignment is in statutory form. The Law of Property Act, 1925, s. 77, sub-s. 1 (*c*), provides that there shall be deemed to be included and implied in a conveyance of the land comprised in a lease a covenant by the assignee or joint and several covenants by the assignees with the conveying party in the terms set out in Part IX. of the Second Schedule to the Act ; and it is there set out that there shall be implied a covenant that the assignees will pay all rent and perform all the lessee's covenants, and also will save harmless and keep indemnified the conveying parties from and against all proceedings and costs on account of any omission to pay rent or breach of covenant. The assignment of 1936 by clause 4 assigns to the defendant the benefit of the covenants of the third party for payment of rent and performance of lessee's covenants ; and by clause 5, which follows the statutory form, it releases the company and the liquidators from all claims in respect of the covenants by the company in the previous assignments except in so far as necessary to enable the defendant to enforce the covenants and indemnities assigned to him. These words give effect to the defendant's rights under clause 4. Clause 6 does not take away these rights.

Burrows K.C. replied.

GREER L.J. In this case an action was brought by a Mr. Josselson, the landlord of premises in the City of London, against Mr. T. Borst, the original lessee, for rent due under the terms of the lease, and the plaintiff recovered judgment against the defendant for the rent claimed. The defendant alleged that under an assignment of July, 1936, he was entitled to be indemnified by a Mr. Gliksten by reason of the terms contained in that deed.

The case depends, in my judgment, entirely upon the application to its facts of three statutory provisions. The first of these provisions to which I desire to refer is s. 81 of the Law of Property Act, 1925, reproducing an earlier section of the Conveyancing Act, 1881. The section is in these terms: "A covenant, and a contract under seal, and a bond or "obligation under seal, made with two or more jointly, to "pay money or to make a conveyance, or to do any other "act, to them or for their benefit, shall be deemed to include, "and shall, by virtue of this Act, imply, an obligation to do "the act to, or for the benefit of, the survivor or survivors "of them, and to, or for the benefit of, any other person to "whom the right to sue on the covenant, contract, bond, or "obligation devolves, and where made after the commencement of this Act shall be construed as being also made with "each of them." I understand that to mean that where before the Act there would have been a joint covenant with two or more people to do any act, then after the passing of the Act of 1925 that covenant is to be construed as being made with each of the contracting parties, that is to say, as having ceased to be merely a joint contract and as having become a joint and several contract. If that is so, it was admitted by Mr. Burrows in his learned argument that the authorities which he cited in regard to the law as it existed before the provisions of s. 81 of the Act of 1925 came into force would not be applicable to this case. A covenant with two or more jointly made after the Act of 1925 is to be construed to be a separate covenant with each of the covenantees, and that separate covenant can be relied upon by any of them; and, that being so, I am clearly of opinion that we may treat the covenant for indemnity, which is a covenant made with two or more people, namely the company and the liquidators, as if it were not merely a joint covenant, but as if it were also a several covenant with each of the covenantees and one capable of being enforced by each of them.

Then, as is well known, s. 136 of the Law of Property Act, 1925, reproducing the corresponding section in the Judicature Act, 1873, provides: " Any absolute assignment by writing "under the hand of the assignor (not purporting to be by "way of charge only) of any debt or other legal thing in action, "of which express notice in writing has been given to the "debtor, trustee or other person from whom the assignor "would have been entitled to claim such debt or thing in "action, is effectual in law (subject to equities having priority "over the right of the assignee) to pass and transfer from the "date of such notice—(*a*) the legal right to such debt or thing "in action." What is transferred under s. 136 is a legal right which may be the several right of one of two or more parties, and I do not understand how it can be contended in the circumstances of this case that the assignment of July, 1936, assuming that due notice was given of it, is not covered by s. 136, as being an assignment of that which, if there had been no such assignment, would have been a good several cause of action by the company as covenantee against the third party as covenantor. What is said in this case is that there are not only several covenantees but there are two covenantors, and there must be notice to both the covenantors and there must be something which entitles the covenantee or his assignee to say that he can sue in his own name one of the covenantors quite independently of the other covenantor. That raises the question as to the effect of s. 118 of the Bankruptcy Act, 1914, which is in these terms: " Where a "bankrupt is a contractor in respect of any contract jointly "with any person or persons, such person or persons may sue "or be sued in respect of the contract without the joinder of "the bankrupt." That means in such a case as the present that one of the covenantors who has not become bankrupt can be sued without joining the other covenantor who has become bankrupt. The effect of the provision is that the old rule, that an action on a joint contract in which all the joint contractors are not joined gives rise to a plea of abatement, has no application where one of the covenantors who is not sued has become bankrupt.

For these reasons I think neither point No. 1 nor point No. 2 of the points which were made by Mr. Burrows has any validity, or is entitled to prevail in this case.

I will deal later with point No. 3.

Point No. 4 is a separate point dependent upon other considerations. Counsel for the third party says that if regard be had not merely to clause 6 of the assignment of 1936, but also to clauses 4 and 5, it is found that those two earlier clauses emasculate clause 6 so as to render it a nullity having no effect whatever. [His Lordship read clause 6.] The rules as to the construction of a document involve the proposition that the document ought to be so construed as to give it validity, if it can be so construed without unduly straining the words used in it. In order to construe clause 6 it is quite true that one must look at the other clauses, but one must look also at the recitals in the deed and at clause 6 itself with a view to coming to the conclusion, if one possibly can, that it is intended to mean something and not to mean nothing. The words which have been cited by Mr. Spens from *Perkins'* case (1) apply, in my judgment, to the present case: "The release contained in the deed, although couched "in very general terms" [as the release in this case was] "must, if possible, be so construed as not to defeat the object "or purpose of the deed of which it forms part." The construction which Mr. Burrows has asked us to put upon this assignment is such as would nullify entirely the effect of clause 6, and for that reason I decline to accept the construction which Mr. Burrows asked the Court to put upon it.

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(1) [1898] 2 Ch. 182, 190.

Point No. 3 taken on behalf of the third party is that the covenant purported to be assigned is not a covenant "to pay "money" or to do any similar act within the meaning of s. 81 of the Act of 1925, but is a covenant the breach of which would sound in damages; and therefore that the assignment is not a valid assignment of the covenant under that section. One of the matters which had been undertaken by Mr. Gliksten was that he would in fact pay the rents as they became due and not merely that he would indemnify in reference to matters which could only be treated as matters of indemnity—namely, the performance of the covenant. Having undertaken that he would in fact pay the rents as they became due and not having paid those rents, I think he is liable to the defendant (the plaintiff in the third-party proceedings) in respect of the rents as and when they fell due. The rents due are liquidated sums and they do not sound in damages at all; the claim is for a debt which the third party had undertaken that he would pay. For these reasons I think Mr. Burrows' contention that this is a case concerned with damages and not with debt is one that ought not to be accepted. All the points which have been made with such learning and ability by Mr. Burrows therefore fail.

In a very careful and considered judgment Singleton J. came to the conclusion that the claim which was made as against the third party, Mr. Gliksten, should be allowed, and awarded as against him the amount of the rent recovered in the action. For the reasons I have given I think the learned judge was right in his conclusions and that his judgment must stand.

SLESSER L.J. I agree. In this case an action was brought by one Mr. H. Josselson as landlord against Mr. T. Borst, his tenant, for rent and insurance premiums due under a lease dated May 7, 1923, and judgment was given for the plaintiff against the defendant. The defendant, however, claimed a right under an assignment to an indemnity against one

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Mr. L. Gliksten, and he accordingly brought in the latter as a third party for the purpose of enforcing the indemnity against him. [His Lordship stated the facts of the case and continued as follows:] The particular document which we have here to consider is the assignment of July 13, 1936. Mr. Burrows says that through four defects in that document, each of which he describes as fatal, Mr. T. Borst can no longer rely upon it, in order to obtain indemnity thereunder, for the amount of the rent which he has had to pay to Mr. Josselson, the lessor. The object of that assignment and the indemnity is obvious. It is to short-circuit the remedies which Mr. T. Borst would otherwise have to pursue and to make Mr. Gliksten immediately and directly liable to him without recourse to any further proceedings. On the face of that document it would appear clear that Mr. Borst had received the required indemnity. Clause 4 says: "In pursuance of "the said agreement and in consideration of the covenant by" T. Borst "hereinafter contained the Company,"—that is B. Borst, Ld.—"acting by the liquidators hereby assigns to" T. Borst "all and singular the full benefit and advantage of "the several covenants for the payment of the rent reserved "by and performance of the lessees' covenants and indemnities "by the said L. Gliksten and R. B. Borst contained as here-"inbefore recited in the hereinbefore mentioned assignments."

The first point which is made by Mr. Burrows is that the covenant in the assignment of December 1, 1931, is in its terms a joint covenant, that is, that the liquidators and the company are the covenantees—"the purchaser and the assignee "hereby covenant with the Company and with the liquidators" —and that therefore to assign effectually that covenant it was necessary that the liquidators as well as the company should assign; whereas, he points out that by clause 4 of the later assignment of 1936 the assignment is said to be by "the Company acting by the liquidators" and not "by the "liquidators." Such an argument might have been very impressive if the earlier document of December 1, 1931, had been joint and not several; but, as my Lord has pointed out, by the operation of s. 81 of the Law of Property Act, 1925, it is provided specifically that a covenant made with two or more jointly, to pay money or to do any other act to them or for their benefit ". . . . where made after the commencement "of this Act shall be construed as being also made with each "of them," and as creating therefore several rights and liabilities. Although it is not necessary to decide the point, except upon the assumption which Mr. Burrows asks us to make that this covenant was not made " for their benefit " within the meaning of the section, a view which, speaking for myself, I do not accept, I think that the covenant itself in its terms is several and not joint. Whether a covenant is joint or several depends upon the intention of the parties as expressed by the written document ; and as I find various different obligations undertaken towards the company and the liquidators who are named persons respectively I come to the conclusion that the intention of the contracting parties was to undertake separate and several obligations towards both of them. If there were no other reason for coming to that conclusion I should find it clearly established by the fact that the duration of the obligations to the two parties is different, that to the company being until it is finally dissolved, and that to the liquidators being until they are released from all liability, and those two different periods of liability point in my mind to separate covenants involving separate legal rights and duties. I am clearly, therefore, of opinion both on the construction of the agreement and by reason of s. 81 of the Act of 1925 that the rights and obligations of these covenantees are several ; and if that be so, and as it appears and is not disputed that by clause 4 of the assignment of 1936 the company at least are entitled and bound through their liquidators, it follows that notwithstanding that only one party to the joint covenant, namely the company, is mentioned in the assignment, and that therefore that which is assigned is different from the rights and obligations of all the covenantees, the assignment is not on that account invalid, and that first point fails.

The second point which Mr. Burrows makes, as I understand it, is that as there were two covenantors, namely Gliksten and R. Borst, notice of the assignment should have been served upon both of them, and that, as the uncontradicted fact is that Gliksten alone received notice of the assignment, the notice is therefore bad and the assignment consequently invalid. I think that argument might have had considerable force, for there is no doubt that Gliksten and R. Borst were in terms jointly and not severally bound, were it not for the operation of s. 118 of the Bankruptcy Act, 1914. Mr. R. Borst, in company with some other unfortunate people in this case, was a bankrupt, and that being so his position is affected by the section, which provides: "Where a bankrupt is a "contractor in respect of any contract jointly with any person "or persons, such person or persons may sue or be sued in "respect of the contract without the joinder of the bankrupt." The difference which is alleged here between Mr. Spens's view on the one hand and Mr. Burrows' on the other is this. As I understand Mr. Spens's argument it is that the effect of the notice is procedural or adjectival only, that is to say, it is not dealing with title but with the right to promote the action, and that had it not been for the notice bringing the assignment within s. 136 of the Law of Property Act, 1925, it might well have been that the assignee would have had to sue in the name of the assignor, and that in so far as s. 136 speaks of the express notice in writing being given to the person from whom the assignor would have been entitled to claim, in so far as pursuant to the power conferred by s. 118 of the Bankruptcy Act the claim now need be made only against Mr. Gliksten, it is sufficient for notice to be served upon him as the person against whom the claim is made and who is to be sued. In my opinion that is a sound argument. I do not think that the interesting and almost metaphysical consideration that one has to establish a complete title in both the debtors or parties liable before one can get them into the position in which the person serving the notice can elect to sue only the one or the other, is sound. I think the proper view is that stated by Mr. Spens, that it is only necessary in such a case to serve the notice in order to take advantage of s. 136 of the Law of Property Act in regard to that person against whom the claim is made and whom it is sought to sue—assuming always that otherwise in law there is a good case against that person alone, which here there is by reason of the operation of the Bankruptcy Act, s. 118.

As to the third point I need say nothing except that I agree with my Lord that here there is a several covenant partly sounding in damages and partly in debt, namely a specific claim for rent, which was the actual claim here made, altogether apart from any claim for other breaches of covenant, a claim for which he would not be liable in so far as they fell to be indemnified.

Finally, the fourth alleged fatal point is that on its construction the whole assignment is nugatory. One would hesitate to come to such a conclusion if only for the reason that, as I understand it, this agreement has had the approval, which was necessary in so far as the liquidators are parties, of the Registrar of Companies and has also received the careful consideration of drafting counsel. These circumstances in themselves would not of course be conclusive, but they make one hesitate, as one would indeed hesitate in any event, before assuming that such a contract as this is nugatory. But Mr. Spens has satisfied me that the indemnity which is referred to in clause 5 releasing the company and the liquidators from all claims and admission on the part of the company or implied in the assignments brings in by implication the indemnities which are set out in Part IX. of the Second Schedule of the Law of Property Act, 1925, and inserted in the contract by operation of s. 77, and that it is right, therefore, to read into the earlier contract that the covenantors will "save harmless and keep indemnified the conveying parties "and their estates and effects." That being so, the complete indemnity is established to my satisfaction against Mr. Gliksten and Mr. R. Borst in clauses 4 and 5. Clause 6 may be given a meaning in that as regards the liquidators, they being named persons, the indemnity may act to indemnify them against liabilities in their personal capacity and as regards the company. If it had been necessary to sue in the name of the company rather than in the name of the assignees for want of proper notice or for some other reason, it might well have been necessary to indemnify the company apart from the general indemnification given to Mr. Gliksten by the assignment and given originally by the company to Mr. T. Borst.

For these reasons I agree that all these four alleged points prove on examination to be quite innocuous as regards their effect upon the validity of the assignment of 1936, and that this appeal fails.

SCOTT L.J. I concur in the conclusions arrived at by the other members of the Court.

Appeal dismissed.

Solicitors for appellants: *Bishop & Fenton-Jones.*
Solicitors for respondents: *W. R. J. Hickman & Randall.*

J. R.

WATERHOUSE *v.* REID.

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1938
Jan. 11.

[1937. N. No. 753.]

Practice—Service of writ of summons out of the jurisdiction—Defendant domiciled in Scotland—Claim indorsed on writ for fraudulent misrepresentation—Statement of claim delivered with claim for breach of warranty—Claim for breach of warranty struck out—Rules of the Supreme Court, Order XI., *r.* 1 (*e*) (*ee*) ; *Order* XX., *r.* 4.

Where leave has been granted under Order XI., r. 1 (*ee*), to serve a writ out of the jurisdiction claiming damages for a tort committed within the jurisdiction upon a defendant who is domiciled in Scotland, it is not competent for the plaintiff subsequently to deliver a statement of claim containing also a claim based upon a contract made within the jurisdiction which was not upon the writ when leave was granted, and in respect of which leave to serve the writ out of the jurisdiction could not have been granted.

APPEAL from a decision of Hilbery J. at Chambers.

The plaintiff, Arthur Reginald Waterhouse, and the defendant, Peter Reid, were both medical practitioners.

On March 4, 1937, the plaintiff issued a writ pursuant to an order of Swift J. against the defendant, who was living in Iraq, claiming damages for fraudulent misrepresentation on the sale of a medical practice and house at Sunderland. This writ was served on the defendant, Reid, at Morgie Basra, Iraq, on July 26, 1937.

With the writ was delivered a statement of claim in which the plaintiff alleged that the defendant with intent to induce the plaintiff to purchase the defendant's practice and house at Sunderland verbally represented and/or warranted certain facts therein set out ; that the said representations were untrue and were made fraudulently ; and that by reason of the said fraudulent misrepresentations and/or breach of warranty of the defendant the plaintiff had suffered damage in that he had been induced to pay more for the said house and practice than the same were worth, and the plaintiff claimed damages for fraudulent misrepresentation and/or breach of warranty.

A summons was then taken out on behalf of the defendant asking for an order that so much of the plaintiff's statement of claim as alleged that the defendant warranted to the plaintiff certain facts set out in the statement of claim and the breach of those warranties should be struck out, on the ground that the same was unnecessary, was contrary to the rules of pleading, completely changed the cause of action indorsed on the writ of summons, was an abuse of the process of the Court, and tended to prejudice, embarrass or delay the fair trial of the action. Master Burnand made no order on the hearing of the summons.

The defendant then appealed to Hilbery J., the judge in Chambers, who upheld the decision of the Master and dismissed the appeal, but gave the defendant leave to appeal to the Court of Appeal.

It was admitted that the defendant was domiciled in Scotland.

The defendant appealed.

The relevant rules of the Supreme Court are as follows:—

Order II., r. 4: "No writ of summons for service out of "the jurisdiction . . . . shall be issued without the leave of "the Court or a Judge."

Order XI., r. 1: "Service out of the jurisdiction of a writ "of summons . . . . may be allowed by the Court or a "Judge whenever . . . . (*e*) The action is one brought against "a defendant not domiciled or ordinarily resident in Scotland "to enforce, rescind, dissolve, annul or otherwise affect a "contract or to recover damages or other relief for or in "respect of the breach of a contract—(i.) made within the "jurisdiction . . . . (*ee*) The action is founded on a tort "committed within the jurisdiction."

Order XX., r. 4: "Whenever a statement of claim is "delivered the plaintiff may therein alter, modify, or extend "his claim without any amendment of the indorsement of the "writ."

C. D. Aarvold for the appellant. The statement of claim ought to be amended by striking out all reference to and claim in respect of a breach of warranty. The defendant is domiciled in Scotland and under Order XI., r. 1 (*e*), of the Rules of the Supreme Court, service out of the jurisdiction of a writ of summons may not be allowed by a Court or judge when the action is one brought against a defendant domiciled in Scotland to enforce a contract or recover damages in respect of the breach of contract made within the jurisdiction; but service out of the jurisdiction may be allowed under (*ee*) against a defendant domiciled in Scotland where the action is founded on a tort committed within the jurisdiction. Leave to serve the writ of summons out of the jurisdiction in respect of fraudulent misrepresentation was granted under that rule. It was held in *Lenders* v. *Anderson* (1) that there was no power to allow service of a writ out of the jurisdiction in actions for breach of contract where the defendant is domiciled or ordinarily resident in Scotland or Ireland. Down to the time of the Common Law Procedure Act, 1852, there was no provision for service of a writ out of the jurisdiction. That defect was remedied by s. 18 of that Act, but that section expressly excepted Scotland and Ireland from the operation of its provisions. A cause of action not within the rules cannot be tacked on to one which is within the rules, and in respect of which leave to proceed has been obtained: see Piggott's Service Out of the Jurisdiction, ed. 1892, p. 16. Martin B. said in *Diamond* v. *Sutton* (2): "But for the Act, the plaintiff could not sue at all; the Act "allows him to sue a defendant residing out of the jurisdiction "for acts committed here; but it is an abuse of the Act if, "under its powers, he brings the defendant here, and then "includes in the same action matters occurring elsewhere, "and for which the Act does *not* give him power to sue; "and the defendant is entitled to ask for protection against "this abuse." If there was a doubt whether the cause of action fell within the sub-rule of Order XI. or not, the Court adopted this practice; "they put the plaintiff under an "undertaking that if it appeared at the trial that there was "no cause of action within the jurisdiction, then, although

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(1) (1883) 12 Q. B. D. 50. (2) (1866) L. R. 1 Ex. 130, 132.

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"there might be a cause of action, he was to submit to have "his action dismissed"—see per Jessel M.R. in *Fowler* v. *Barstow*. (1) See also *Diamond* v. *Sutton* (2), *Arrowsmith* v. *Chandler*. (3)

[He was stopped.]

John Neal for the respondent. It is true that in the statement of claim a claim for breach of warranty was added to the claim indorsed on the writ, but Order XX., r. 4, expressly allows a plaintiff by his statement of claim to alter, modify or extend his claim without any amendment of the indorsement of the writ. The addition of a claim for misrepresentation not based upon fraud to a claim for fraudulent misrepresentation would come within that rule. When a plaintiff has brought a defendant within the jurisdiction by means of a writ he is entitled to alter the claim against him by adding in his statement of claim a claim that is ancillary to the original claim indorsed on the writ. Order XI., r. 1 (*e*), only speaks of the service of a writ out of the jurisdiction and does not say anything about a statement of claim. In *Diamond* v. *Sutton* (2) an undertaking was given to prove a cause of action that had arisen within the jurisdiction of the Court. If there was no legal right to rely upon a cause of action other than that set out in the writ, there was no necessity for the undertaking. Orders imposing terms limiting the plaintiff's right to recover at the trial have only been made where the judge is left in doubt whether a cause of action has arisen within the jurisdiction—see *Thomas* v. *Duchess Dowager of Hamilton*, per Lord Esher M.R. (4) Unless there is a doubt whether a cause of action has arisen within the jurisdiction the judge's discretion refusing to strike out a cause of action in the statement of claim will not be interfered with.

GREER L.J. Mr. Neal for the plaintiff has done his best, but we are unable to accede to his argument. For if it were successful its effect would be to repeal Order XI., r. 1 (*e*), of the Rules of the Supreme Court, and, indeed, where leave had been properly granted under Order XI. to serve a writ out of the jurisdiction for one cause of action, to enable the plaintiff, in any case where it was convenient, subsequently to add a claim for another cause of action, for which leave to serve a writ outside the jurisdiction would not have been granted. Until the passing of the Common Law Procedure Act, 1852, a writ could not be served out of the jurisdiction in any way. Then later a code was drawn up which is now to be found in Order XI. of the Rules of the Supreme Court, and unless the plaintiff's case can be brought within the terms of that code leave to serve a writ out of the jurisdiction cannot be granted. Rule 1 (*e*) of Order XI. prevents service out of the jurisdiction of a writ of summons upon a person domiciled or ordinarily resident in Scotland for a cause of action giving rise to a claim for damages or other relief for or in respect of a breach of contract made within the jurisdiction. In my judgment the Court has no jurisdiction to alter that rule on the ground that it would be convenient to try such a cause of action within the jurisdiction. Mr. Neal for the plaintiff quite rightly called our attention to cases in which it has been held that the proper procedure was to obtain an undertaking from the plaintiff not to add another cause of action to that set out in the writ of summons—see *Diamond* v. *Sutton*. (1) In my view such a step would be taken only ex abundanti cautela. It is admitted that the defendant in this case is domiciled in Scotland and accordingly that a writ claiming damages for breach of warranty on such a contract could not be served on him in Iraq, where at the material time he resided. It would be a breach of Order XI., r. 1 (*e*), to permit the plaintiff, who has obtained leave to serve a writ in Iraq on the defendant, who is domiciled in Scotland, claiming damages for fraudulent misrepresentation, that is for a tort, to add to that claim a claim in his statement of claim for a breach of warranty. The appeal must be allowed and the claim for damages for breach of warranty struck out of the statement of claim.

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(1) (1881) 20 Ch. D. 240, 243.
(2) L. R. 1 Ex. 130.
(3) (1872) 27 L. T. 242.
(4) (1886) 17 Q. B. D. 592, 596.

(1) L. R. 1 Ex. 130.

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SLESSER L.J. I agree. The plaintiff issued a writ by which he claimed damages for fraudulent misrepresentation on the sale of a medical practice and a house in Sunderland. By Order XI., r. 1 (*ee*), of the Rules of the Supreme Court, service out of the jurisdiction may be allowed of such a writ of summons, as the action was founded on a tort committed within the jurisdiction. The plaintiff applied for leave to serve this writ out of the jurisdiction on the defendant, who is resident in Iraq. Leave was granted and this writ was so served. The statement of claim in the action was served with the writ and by the statement of claim the plaintiff claimed damages not only for fraudulent misrepresentation, but also for breach of warranty—a claim in contract. By Order XI., r. 1 (*e*), of the Rules of the Supreme Court, leave may be granted to serve a writ of summons out of the jurisdiction on a claim based on a contract made within the jurisdiction "against a defendant not domiciled or ordinarily resident in "Scotland." But the defendant on whom the writ claiming damages for fraudulent misrepresentation has been served is, it is admitted, domiciled in Scotland. And so, had application been made for leave to serve a writ upon him in Iraq, claiming damages for breach of warranty, it would have been refused. On application by the defendant to Master Burnand to strike out from the statement of claim the plaintiff's claim for damages for breach of warranty and all reference thereto the Master dismissed the application, and on appeal Hilbery J. upheld his decision, but gave leave to appeal.

Mr. Neal on behalf of the plaintiff contends that once leave has been granted to serve a writ out of the jurisdiction and it has been properly served there, it is then competent for a plaintiff to add in his statement of claim an ancillary claim to that indorsed on the writ for a cause of action which was not the claim on the writ which he had obtained leave to serve out of the jurisdiction. For this contention he relies on Order XX., r. 4, of the Rules of the Supreme Court, which provides that "whenever a statement of claim is delivered "the plaintiff may therein alter, modify, or extend his claim "without any amendment of the indorsement of the writ."

Indeed, it was pointed out in *Large* v. *Large* (1), where leave was asked to amend the indorsement of a writ and the statement of claim in certain particulars, that when a statement of claim had once been delivered, amendment of the indorsement on the writ was unnecessary. No doubt this provision is convenient, but it does not give a right to a plaintiff to insert in his statement of claim a cause of action which, if it had been indorsed on the writ, would have prevented leave being granted to serve it out of the jurisdiction. In my view Order XX., r. 4, of the Rules of the Supreme Court is powerless to give the Court general jurisdiction to alter and extend the plaintiff's claim by means of the statement of claim where such jurisdiction is not afforded by Order XI. itself. When the cause of action is based on a contract made within the jurisdiction and the defendant is domiciled or ordinarily resident in Scotland, the Court is precluded from granting permission to serve the writ out of the jurisdiction. No doubt that limitation of jurisdiction is confined to the writ; but in my opinion it is not competent, in a case where leave has been granted to serve a writ claiming damages for a tort committed within the jurisdiction upon a defendant who is domiciled in Scotland, to allow the plaintiff subsequently to deliver a statement of claim containing also a claim based on a contract made within the jurisdiction which was not upon the writ when leave was granted.

SCOTT L.J. I agree and have nothing to add except this. Leave was granted by Swift J. to serve this writ upon the defendant who is resident in Iraq but who is domiciled in Scotland. The cause of action endorsed on the writ was a claim for fraudulent misrepresentation committed within the jurisdiction. Doubtless leave was granted upon an affidavit that the plaintiff desired to sue in tort and not on a cause of action in contract within one of the categories contained in Order XI., r. 1 (*e*), of the Rules of the Supreme Court. As the defendant is domiciled in Scotland, under the terms of

(1) (1877) W. N. 198.

that rule leave to serve a writ on such a claim out of the jurisdiction would have been refused. The plaintiff cannot be placed in any better position by inserting such a cause of action in his statement of claim without leave than he would have been had he asked for leave to serve a writ containing this claim and had been refused. In my view the statement of claim must be amended so as to omit any claim for breach of warranty.

Appeal allowed.

Solicitors for appellant (defendant): *Pilley & Mitchell, for James Storey & Sons, Sunderland.*

Solicitors for respondent (plaintiff): *Bell, Brodrick & Gray, for Reginald C. Dobson, Leeds.*

R. F. S.

Explained. *Re* McGreavy. [1950] 1 All E.R. 30.

Explained. *In re* McGreavy [1950] 1 Ch. 150

Explained. *In re* McGreavy [1950] 1 Ch. 269

LIVERPOOL CORPORATION *v.* HOPE.

C. A.
1938
Feb. 3.

Local authority—Rates—Claim for arrears—Procedure—Distress—Action not available—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 109, *sub-s.* 8 (*i.*).

An action by a local authority to recover unpaid arrears of rates will not lie. The proper method of procedure in such a case is by an application for a distress warrant followed by distress.

A local authority commenced proceedings in the county court for certain unpaid arrears of rates which they alleged to be due. The county court judge having held that on such a claim an action would lie, the respondent appealed:—

Held (reversing the decision of the county court judge), that, a rate not being a common law liability but the creature of statute, this method of procedure was wrong, and the only remedy available was that laid down by statute, namely distress.

Held, further, that the non-payment of rates by a receiver appointed by a mortgagee is not a breach of statutory duty under s. 109, sub-s. 8 (i.), of the Law of Property Act, 1925, for which the local authority is entitled to sue.

Appeal from a judgment of His Honour Judge Dowdall K.C. sitting in the Liverpool County Court.

The claim was by the Corporation of Liverpool against Mr. Norman Hope, an estate agent and at one time the receiver of rents in respect of certain premises in Liverpool owned by one Hodson. The premises were such that the rates due in respect thereof were paid by the system of "compounding." The rates having fallen into arrear, on October 12, 1936, an order for payment was made against Hodson by the magistrates. Hodson having previously mortgaged the premises to a building society and being also in arrear with his mortgage interest, the mortgagees on November 7, 1936, appointed the defendant Hope their receiver, who duly paid the rates maturing after his appointment. The action brought by the corporation against Hope was one for the rates due and not paid by Hodson in pursuance of the order of October 12 down to the date when he (Hope) was appointed receiver. Alternatively the plaintiff corporation also claimed the sum due as damages by virtue of the Law of Property Act, 1925, s. 109, sub-s. 8 (i.), for the breach, as they alleged, of a statutory duty. (1) The learned county court judge having found on both claims in favour of the corporation, the defendant Hope appealed.

John Charlesworth for the appellant. The claim presented here on behalf of the plaintiff corporation will not lie. The only remedy available to a local authority for recovery of unpaid rates is the remedy of a distress warrant followed by distress. Rates are now (with possibly the exception referred to in s. 11 of the Act) only recoverable in the manner laid down by statute: see the Rating and Valuation Act, 1925, s. 2, sub-s. 3, which enacts that every general rate shall be recoverable in the same manner in which at the commencement of the Act the poor rate might be recovered. All the statutes dealing with the recovery of rates make distress the remedy: compare the old Poor Relief Act, 1601 (43 Eliz. c. 2), s. 2. [He referred also to the Poor Relief Act, 1814, s. 12; the Distress for Rates Act, 1849; and the Poor Rate Assessment and Collection Act, 1869, ss. 11 and 12.] The Rating and Valuation Act, 1925, will not, however, it is submitted, apply here: see s. 11, sub-s. 10; therefore only the Act of 1869 can be regarded.

As regards the question of the receiver going into possession and the effect on a right to distrain, see the case of *In re Marriage, Neave & Co.* (2) The receiver could not be liable in an action in any event for these arrears of rates: there is no liability before being on the rate book.

F. A. Sellers K.C. and *J. S. B. Lloyd* for the respondents. Though there is no authority on this particular point that an action may be brought, there is nothing to show that it cannot lie; the remedy by distress is an additional remedy to recover rates.

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(1) Law of Property Act, 1925, s. 109, sub-s. 8: "Subject to the "provisions of this Act as to the "application of insurance money, "the receiver shall apply all "money received by him as "follows, namely:

"(i.) In discharge of all rents, "taxes, rates, and outgoings "whatever affecting the mortgaged property; and

"(ii.) . . . ."

(2) [1896] 2 Ch. 663.

John Charlesworth in reply.

SLESSER L.J. This appeal succeeds. This is a claim by the Lord Mayor, Aldermen and Citizens of the City of Liverpool against Mr. Norman Hope, an estate agent, who was at one time the receiver of the rents of certain premises which were owned by a Mr. Hodson. The premises are such that the rates are paid by what is called "compounding," that is to say, as is usual with small properties, the landlord has agreed with the corporation to pay rates which otherwise might have fallen upon the tenant. There is no question but that these rates fell into arrear, and on October 12, 1936, an order for payment was made on Mr. Hodson by the magistrates. We read in the judgment of the learned county court judge that as Mr. Hodson expected to pay by December, 1936, no further immediate action was taken. But Mr. Hodson was not only in arrear with his rates; he was also in arrear with his mortgage interest to his mortgagees, a building society called the Universal Permanent Building Society, and on November 7, 1936, the building society appointed the defendant, Mr. Norman Hope, as receiver. Since that date the defendant has paid the rates maturing.

This is an action for the rates down to the date when he was appointed receiver, which are in arrear. It appears that since he was appointed receiver he has in fact collected a sum of more than 60*l.* 5*s.* 8*d.*, in addition to the rents maturing since then, from tenants—a fact which seems to me irrelevant. The learned county court judge had to consider the claim as formulated, but, at the request of the counsel appearing for the plaintiffs, he allowed an amendment of that claim. The amendment does not appear to have been reduced into writing, but the effect of it was that the plaintiffs would rely alternatively upon damages flowing from a breach of statute. The learned county court judge in his judgment thinks that on both grounds the action would lie. In my opinion on neither ground can this action be supported.

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Slesser L.J.

As to the first ground, which appears on the face of it to be an ordinary common law claim for debt, it is clear to my mind that the only remedy which is afforded to a local authority entitled to rates is the remedy of distress. A rate is not a common law liability, it is the creature of statute. Although it may not now be necessary for many purposes to travel behind the Rating and Valuation Act, 1925, for this purpose I think it is necessary to go back to the Poor Relief Act of 1601 (43 Eliz. c. 2), which provides for money being raised for the relief of the impotent poor and the like and, by s. 2, provides that justices may make rates in aid of parishes, and that in the event of rates not being paid the overseers may levy rates and arrears by distress. It goes on: "It "shall be lawful as well for the present as subsequent church-"wardens and overseers or any of them, by warrant from "any two such justices of peace as is aforesaid, to levy as "well the said sums of money, and all arrearages, of every "one that shall refuse to contribute according as they shall "be assessed, by distress and sale of the offender's goods, as "the sums of money or stock which shall be behind upon "any accompt to be made as aforesaid, rendering to the "parties the overplus." That is the only remedy which is afforded by that statute. Since that time a number of statutes has been passed dealing with rating, which I think it is unnecessary here to consider. It is sufficient to say that it is really not suggested, and it could not be suggested, that any statute from the year 1601 down to the Rating and Valuation Act, 1925, or any Act amending that Act, has ever provided the local authority with any remedy for the non-payment of rates other than the remedy by distress. In those circumstances the learned county court judge does not, as I understand it, suggest that there is any remedy at common law by action for the non-payment of rates, but he does suggest that an analogy should be drawn between a rating authority demanding rates and a landlord demanding rent. This is the passage which seems to me to form the basis of his judgment and to be plainly wrong: "But the "rating authority has statutory authority to raise the rates "from the ratepayer and, though distraint is the usual "procedure, that does not necessarily take away the right of "action, any more than a landlord's power to distrain for rent "takes away his right to sue for it." It is elementary that the right of a landlord to sue for his rent arises either out of some express covenant or contract or out of tenure. There is no such relationship, there is no such contract, as between the local authority and the ratepayer, and the whole analogy is unsound.

The second method of formulation seems to be equally fallacious. It is said that there is here a breach of statute. It has been decided in many authorities, of which the case of *Groves* v. *Lord Wimborne* (1) is perhaps the leading one, that in appropriate cases where a person does suffer damage by reason of breach of a statutory duty by another he may recover those damages in an action; but this principle is wholly inapplicable to the present case, for the very good reason that there is no statutory duty on Mr. Hope, the receiver here, the breach of which could in any conceivable circumstances give a right to damages to the local authority, the Liverpool Corporation. The alleged statutory duty which it is said he has failed to perform is contained in s. 109, sub-s. 8, of the Law of Property Act, 1925, which says: "Subject to the provisions of this Act as to the application "of insurance money, the receiver shall apply all money "received by him as follows, namely (i.) In discharge of all ". . . . rates . . . . affecting the mortgaged property." That is no more than a power and obligation to be read into the mortgage deed. It is, as s. 101 indicates, part of the powers incident to the estate or interest of the mortgagee, and for the sake of clarity is there stated rather than being fully written out in the mortgage deed as between the parties to the mortgage. It follows therefore that there is no semblance of a statutory duty to the corporation, no breach of that statutory duty and no damages flowing from it.

It follows that this appeal must be allowed with costs.

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(1) [1898] 2 Q. B. 402.

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SCOTT L.J. I agree and have nothing to add.

CLAUSON L.J. I agree.

Appeal allowed.

Solicitors: *King, Wigg & Brightman, for Clayton & Gibson, Newcastle-upon-Tyne; Venn & Co., for W. H. Baines, Town Clerk, Liverpool.*

A. R. LL.-T.

WELCH *v.* ROYAL EXCHANGE ASSURANCE.

1938
Jan. 28.

Insurance—Fire—Condition of Policy—Condition precedent—Obligation to give proofs and information as may reasonably be required—"No claim payable unless the terms of this condition shall have "been complied with"—Compliance within a reasonable time.

By the terms of a policy of fire insurance the conditions thereof were, "so far as the nature of them respectively will permit," to be deemed to be conditions precedent to the right of the insured to recover. Condition IV. provided that on making a claim the insured should "give to the corporation all such proofs 'and information with respect to the claim as may reasonably "be required," and that "No claim under this policy shall be "payable unless the terms of this condition shall have been "complied with." A fire occurred on the claimant's premises and he claimed to be indemnified by the respondent corporation. The respondent corporation repudiated liability, and the dispute was referred to arbitration. The claimant used and controlled for the purposes of his business certain bank accounts in the name of his mother. The respondent corporation repeatedly, both before and during the arbitration, requested the claimant to furnish them with information as to these accounts; but the claimant failed to disclose the said accounts until he was under cross-examination during the arbitration proceedings:—

Held, that Condition IV. was a condition precedent to the liability of the insurers, and that the failure of the assured to give the information required within a reasonable time constituted a breach of that condition and a final bar to his claim.

APPEAL, by way of a special case, from an award of an arbitrator made in respect of a claim under a policy of fire insurance.

The claimant, Henry Welch, a motor tyre and accessory manufacturer and merchant, carrying on business at Montpelier Works, 81 Queen Street, Hammersmith, London, W., by a policy dated June 19, 1929, effected an insurance of his stock-in-trade against fire with the respondents, the Royal Exchange Assurance. It was provided by the policy that the conditions contained therein or endorsed or otherwise expressed thereon should, so far as the nature of them respectively would permit, be deemed to be conditions precedent to the right of the insured to recover. Condition IV. provided that the insured should give all such proofs and information with respect to any claim made by him under the policy as might reasonably be required, and that no claim should be payable unless the terms of this condition had been complied with.

On November 26, 1934, during the currency of the policy, a fire occurred on the claimant's premises, and he claimed to be indemnified by the respondents in respect of the damage to his stock-in-trade. The respondents repudiated liability and the dispute was referred to arbitration. On several occasions before and during the arbitration the respondents requested the claimant to supply them with information as to all banking accounts used or controlled by him for the purposes of his business. The claimant in fact used and controlled two banking accounts in the name of his mother; but it was not until he was under cross-examination during the arbitration proceedings that he disclosed these accounts. Thereupon the respondents, who had by their defence alleged fraud and fraudulent exaggeration, obtained leave to amend their points of defence by alleging that the claimant had been guilty of a breach of Condition IV., and that his claim was therefore barred. The arbitrator's award was in favour of the respondents on the construction of Condition IV., and the claimant now appealed.

The conditions of the policy, and the material parts of the arbitrator's award, are fully set out in the judgment.

Norman Birkett K.C. and *R. E. Borneman* for the claimant. The learned arbitrator has found in favour of the claimant on all the points raised by the respondents except one, and that is a purely technical point. He has found that there was no fraud or fraudulent exaggeration, and no use of a fraudulent means or device to obtain benefit under the policy. He has found that the banking accounts, which admittedly the claimant failed to produce when requested to do so by the respondents, were reasonably required by the respondents; but he has also found that those accounts contained no information which justified or tended to justify the repudiation of the claim. In those circumstances he has held that the claimant committed a breach of Condition IV. of the policy, that Condition IV. is a condition precedent to the respondents' liability under the policy, and that the breach of it is a final bar to the claim. It is to be observed, however, that leave to amend the points of defence by alleging a breach of Condition IV. was not applied for until the ninth day of the arbitration, and after the claimant had in fact given the required information as to the two banking accounts, and it was then allowed despite the objection of claimant's counsel. As to what construction is to be placed on Condition IV., coupled with the preliminary paragraph of the policy, see Halsbury's Laws of England, vol. 18, paras. 619, 620. Condition IV. certainly is not a condition which goes to the validity of the policy.

[*Roland Oliver K.C.* I should not contend otherwise.]

I understand my learned friend is seeking to contend that although this is not a condition which goes to the validity of the policy, it is a condition precedent to the claimant's right to recover, and the arbitrator has apparently adopted that view. I contend that this is not a condition precedent to recovery. All that it says is that no claim shall be "payable" unless the terms of this condition have been complied with. The insurers are merely saying, by this condition: "Although you, the assured, may even get an "award in your favour, we will not pay you unless and until "you have complied with the terms of Condition IV."

[BRANSON J. I do not understand that. No arbitrator, in the absence of such information, would make an award.]

When the accounts were produced it was found that they had no bearing on the case at all, and the arbitrator could very well have made an award without seeing them.

[BRANSON J. You discovered that ex post facto.]

The wording of the condition is singular. It does not say that a claimant shall not bring his claim, but merely that, when he has brought it, the insurers reserve the right to withhold payment until the claimant sends the proofs and information which the insurers require. It was never intended, I submit, to say anything more than "Please remember, "when you formulate your claim, that we reserve a right "to ask for information which we reasonably require, to check "your claim, and we will not pay you unless you supply that "information." It was never intended to be in any sense a condition precedent which is an effective bar to a claim.

[BRANSON J. It must be a condition precedent to payment.]

I have to concede that; but it is not a condition which says that the claimant must do this or he will have no right to recover, or to bring an action, or go to arbitration. If it had been intended that a breach of Condition IV. was to be a final bar to recovery, the contract would have said so. It is merely a kind of default clause, by which the insurers reserve the right to withhold payment until certain information has been supplied. In construing a policy all the conditions must be looked at and the policy construed as a whole: *Stoneham* v. *Ocean, Railway & General Accident Insurance Co.* (1) It is not sufficient that a condition is expressed in a policy to be a condition precedent: *In re Bradley and Essex and Suffolk Accident Indemnity Society.* (2) *Weir* v. *Northern Counties of England Insurance Co.* (3) is a case analogous to this. There a claimant failed to give notice of his claim within the stated period, but did so after the date had expired. It was held that a clause requiring notice of a claim to be given within fifteen days was not a condition precedent, but merely a default clause. Here the claimant failed to supply certain information before action, but supplied it before award and before the amendment of the defence. If the Court holds that Condition IV. is a condition precedent to payment, then I say it is a condition precedent to payment, and no more, and that, Condition IV. having been complied with before the award was made, the arbitrator was wrong in law in holding that the failure to supply the required information prior to the arbitration was a final bar to payment. At the worst he was entitled to mark his sense of the failure of the claimant to supply the information when required by giving the respondents recompense in the matter of costs.

Roland Oliver K.C. and *Philip Vos K.C.* for the respondents. The claimant says that because the performance of the condition precedent took place during the arbitration and before the award he is entitled to succeed in his claim, because, for one reason, the respondents had not, up to that time, pleaded a breach of Condition IV. That contention seems to involve two rather remarkable propositions: (1.) that what took place at the arbitration can in the circumstances be called performance, and (2.) that although when a claimant issues his writ and starts proceedings he has no cause of action, yet he can pick up that cause of action in the middle of the proceedings. To start proceedings when you have no cause of action is fatal to those proceedings, although, if they be discontinued in time, a fresh action may be started. The obvious intention of both parties in regard to Condition IV. was that within a reasonable time, while the accounts and the loss were being investigated by accountants, the assured should put before those accountants such material as they might reasonably require. If the claimant refused to do that, he thereby broke his contract. The first demand was made for these accounts on February 11, 1935, and more than two years elapsed before what is now called "performance" was tendered to the respondents in the midst of the arbitration proceedings. There was a complete and irremediable breach by the claimant of Condition IV., and there is no finding by the arbitrator that the final production of the accounts was a performance by the claimant of his obligation. The only question for consideration is the meaning of the stipulations in the policy. This policy has been drawn up in the light of the decision in *Bradley's* case (1), and Condition IV. is perfectly simple, reasonable, and obviously capable of being a condition precedent. Indeed it appears most just that it should be made a condition precedent. I am unable to differentiate between conditions precedent to liability and conditions precedent to payment. Unless it is a condition precedent I do not understand how effect can be given to this obligation to give frank discovery. In *Bradley's* case (1) there was such a jumbling up of all kinds of things in one

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(1) (1887) 19 Q. B. D. 237.

(2) [1912] 1 K. B. 415.

(3) (1879) 4 L. R. Ir. 689.

(1) [1912] 1 K. B. 415.

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clause that the clause could not possibly be said to be a condition precedent. That case cannot be regarded as an authority in dealing with this case. *Weir* v. *Northern Counties of England Insurance Co.* (1) was decided entirely upon its own language.

Birkett K.C. in reply.

BRANSON J. This is an appeal, by way of a special case, from the award of an arbitrator, Sir Walter Monckton, made in respect of a claim against the Royal Exchange Assurance Corporation. The claim arises out of a fire which took place upon the assured's premises on November 26, 1934. He claimed against the respondents on a policy which he had with them, dated June 19, 1929. The question which arises is whether certain conditions in that policy were conditions precedent to the right of the claimant to make a claim, in the sense that non-fulfilment of those conditions put an end, once and for all, to any right in him to claim under the policy in respect to the fire which took place on November 26, 1934; or whether, although at the moment when the arbitration commenced he had not fulfilled the condition in question, what took place at the arbitration amounted to a fulfilment of it, and consequently removed the bar which, when the arbitration commenced, would on that construction of the policy have prevented him from recovering.

The point is not by any means an easy one; but I have formed an opinion about it, and I do not suppose that that opinion would change if I brooded upon it. Therefore I am going to state it now.

The policy contained a number of conditions; and, with regard to those conditions, the policy used the following language: "The Corporation agrees (subject to the conditions "contained herein or endorsed or otherwise expressed hereon "which conditions shall so far as the nature of them respec-"tively will permit be deemed to be conditions precedent "to the right of the Insured to recover hereunder) that if

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(1) 4 L. R. Ir. 689.

"after payment of the premium the property insured" is damaged, certain results shall follow.

As I have said, there was a fire at the claimant's premises, and the learned arbitrator, after setting out the material conditions of the policy, to which I shall refer later, found the following facts: " (*a*) Information about all bank accounts "used or controlled by the claimant for the purposes of his "business was required by the respondents on several occasions, "both before the arbitration proceedings began and before "delivery of the unamended points of defence. (*b*) One "Mrs. Welch, the mother of the claimant, had two bank "accounts—namely, a loan account and a current account. "Both these accounts were used and controlled by the "claimant for the purpose of his business. Large sums of "money accruing to the claimant in his business were paid "by him into the said accounts and large sums were drawn "out of the said accounts by him for the purposes of his "business. (*c*) On being required by the respondents to give "information concerning the bank accounts used or controlled "by him as aforesaid, the claimant failed to give the "respondents any information in respect of the two bank "accounts of the said Mrs. Welch." Then para. 5 is: "During the hearing before me, and in the course of the "cross-examination of the claimant, the claimant for the "first time offered to give, and did give, full information "as to the two banking accounts of the said Mrs. Welch. "Until the said accounts were produced as aforesaid the "respondents were not in possession of sufficient information "to enable them to allege the claimant's failure to give "information in respect of the said accounts as a breach of "Condition IV. of the said policy. In the course of the "hearing, and after the production of the said accounts, "the respondents applied for leave to amend their points of "defence, and I allowed the amendment." Then the learned arbitrator goes on, in para. 6: " By their amended "points of defence the respondents contended that the "claimant's failure to give the information about the said "accounts when required to do so constituted a breach of

"Condition IV. of the said policy, and that the said breach "ought to preclude the claimant from recovering any sum in "respect of his claim under the said policy. The respondents "further contended that the claimant fraudulently concealed "the said accounts from the respondents, and that by reason "thereof he ought to be precluded from recovering any sum "in respect of his claim under the said policy."

Then, after setting out the contentions of the claimant, which I need not read at the moment, he finds as a fact: "(*a*) That the said information as to the said accounts was "reasonably required by the respondents; (*b*) That the "claimant failed to give the respondents information as to "the said accounts when the said information was required "by the respondents; (*c*) That the claimant did not fraudu"lently conceal the said information from the respondents; "(*d*) That the said accounts when disclosed did not contain "any material which justified or tended to justify the "respondents in repudiating the claim under the said policy." Upon those facts the learned arbitrator proceeded to hold: "That the claimant's failure to give information as to the "said accounts when required to do so constituted a breach "of Condition IV. of the said policy, even although the said "accounts when disclosed did not contain any material which "justified or tended to justify the repudiation of the claim "under the said policy." He further proceeded to hold "that "there had been a breach of Condition IV. of the said policy "at the time when the arbitration proceedings began, that "the said breach constituted a bar to the claimant's right to "recover in respect of his claim, and that the said breach "could be relied upon by the respondents, so soon as they "were permitted to raise the point by amendment of their "points of defence." He then held "that Condition IV. is a "condition precedent to the respondents' liability in respect "of a claim under the said policy"; and "that a breach of "the said condition disentitles the claimant to recover any "sum in respect of his claim under the said policy, and that "the fact that the respondents were in possession of the "required information at the time when they amended their "points of defence did not preclude them from relying on "the claimant's failure to supply the said information at any "earlier date as a bar to his right to recover any sum in "respect of his said claim." Having come to that conclusion, the learned arbitrator proceeded to give certain directions as to what was to follow in consequence; the main one being that although he found that, apart from this point, the claimant could recover a large sum of money, in view of this point he was not entitled to recover anything at all. Therefore, from the claimant's point of view the question which is raised before me is one of very great importance.

The first matter for consideration is whether, upon the true construction of this policy, Condition IV. constitutes a condition precedent to the right of the claimant to recover under the policy anything at all in respect of the present claim. It is not contended that the breach of Condition IV. has destroyed the policy; in other words, it is not contended that this condition was a condition precedent to the validity of the policy. What is contended is that it is a condition precedent to the liability of the insurers; and that therefore, the condition not having been fulfilled at any time, this claim cannot succeed.

What is said on behalf of the claimant, first of all, is that upon the true construction of this policy there is no condition precedent at all. Reliance is placed, in support of that contention, upon the decision of the Court of Appeal in *In re Bradley and Essex and Suffolk Accident Indemnity Society.* (1) It is said that, upon the authority of that case, I should give the go-by altogether to such expressions in this policy as seem to say that the condition in question is a condition precedent, and that I should, as a matter of construction, hold that it was not anything of the kind. I do not know whether I am overstating Mr. Norman Birkett's powerful argument, but I think that is a fair representation of it upon this point. I do not think that *Bradley's* case (1) goes anything like as far as that. When one comes to look at it, it appears to me that what it actually decides is that if, upon

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(1) [1912] 1 K. B. 415.

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a close consideration of the language of the policy, it appears that, though there are general words stating that the conditions are to be conditions precedent to any liability of the society under the policy, many of the provisions covered by those general words cannot be conditions precedent, it is not enough to say: " Here are a lot of conditions covered by that "general provision, and you must construe them all as "conditions precedent." For example, when the learned Master of the Rolls was dealing with the matter, he used this language: "But it is perfectly clear that some of those so-called con-"ditions are not, and cannot be, conditions precedent, although "some of them may be and are conditions precedent." Then he says: " Nos. 1 and 2, dealing with notices, may be con-"ditions precedent," but " No. 3, so far as any meaning can "be attributed to it, seems to me not to be a condition "precedent." (1) The condition that they were really dealing with was No. 5; and the Master of the Rolls, after reading the first sentence and the third sentence, said that they could not possibly be conditions precedent, and, that being so, he was not going to hold that the general words converted the middle sentence there into a condition precedent. Fletcher Moulton L.J. energetically dissented from the view expressed by the other two members of the Court. The third member of the Court, Farwell L.J., devoted most of his judgment to a statement, no doubt entitled to the utmost respect, that in his view clauses of this sort in a policy ought to be most carefully watched, and not be given effect to unless they also were contained in the proposal form. No such point as that is raised before me now. The result is that I find it difficult to draw any help from that case, particularly in view of the fact that it appears to me that the covering clause, if I may so term the clause at the beginning of this policy, which says that the conditions are " to be deemed conditions precedent," appears to avoid the difficulty raised on the language of the policy in *Bradley's* case (2) by using the words " so far as the "nature of them respectively will permit," thus taking away the possibility of anybody trying to say that the general

(1) [1912] 1 K. B. 415, 421.

(2) Ibid. 415.

clauses could not be construed to turn the conditions into conditions precedent, because some of them were not capable of that transformation.

The case of *Stoneham* v. *Ocean, Railway & General Accident Insurance Co.* (1) is an authority stating in quite plain terms that where you have language expressing the intention of the parties that the conditions should be conditions precedent, the Court will so construe it. Cave J. says: "It seems to "me that the rational conclusion is that all these conditions "mean what they say, and that where there is a provision "that the condition shall be a condition precedent it is so, "but where there is no such provision it is not."

I think that it is my duty to look at the language used by the parties to this contract (bearing in mind the point that Mr. Norman Birkett takes, that it is the language of the Insurance Company, and not the language of the assured; and, therefore, if there is any real doubt in the matter, that doubt should be resolved contra proferentem), and see what it really does mean. I think one has to read Condition IV. in light of the fact that it occurs on the back of the contract, on the face of which there is the clause which I have already read, providing that the conditions shall be deemed conditions precedent to the right of the assured to recover thereunder; also bearing in mind that that is to be the case "so far as "the nature of these conditions respectively will permit." I turn then to Condition IV. I do not think it is necessary to read the commencing part, except to point out that it commences with the words: "On the happening of any "destruction or damage, the insured shall forthwith give "notice," and so forth. The material words are: "The "insured shall also give to the Corporation all such proofs and "information with respect to the claim as may reasonably be "required, together with (if demanded) a statutory declaration "of the truth of the claim and of any matters connected "therewith." Then there comes a full-stop, followed by: "No claim under this policy shall be payable unless the terms "of this condition have been complied with." The first question that arises upon it is whether there is any obligation to give that information at any particular time. It is contended by Mr. Norman Birkett, on behalf of the claimant, that there is no time limit; and that the real meaning and intention of that clause are that the insurers are saying: "Mark you, until you give me the information which I shall "reasonably require, you may proceed to get an award, you "may proceed to get anything you like, but I will not pay "you, and I shall not come under any liability to hand you "over any money unless these conditions have been complied "with." The result would be, as it seems to me, if that be a correct interpretation, that an assured might decline to give information which was reasonably asked, and might proceed to arbitration, claiming money, in spite of not having given that information, and when defeated at that arbitration by reason of this clause, he has only to give the information, and then start proceedings all over again. I cannot believe that either party to this contract can have thought that that was to be the way in which it could work out. There being no time mentioned, the ordinary rule must apply, and the contract must be construed to mean that the proof and information which may reasonably be required have to be given within a reasonable time. If any question arises as to whether the reasonable time has been exceeded, that will be a matter for the judge of fact, to wit, the arbitrator under the agreement.

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(1) 19 Q. B. D. 237, 241.

If that be the proper construction—and I see no reason why the ordinary implication of a reasonable time should not have effect with regard to this clause in the contract—what had to be done was that the claimant should give the information which was demanded of him within a reasonable time. What was to be the result if that condition were not fulfilled? The policy says the result will be that "no claim under this "policy shall be payable," not "unless and until," but "unless the terms of this condition have been complied with." That means, that if the condition has not been complied with no claim under the policy shall be paid. If that is the true construction, the result is that this claimant, having failed within a reasonable time—for it must be a failure not to have done it before the arbitration commenced—to comply with the condition, has lost his right to make his claim under this policy.

Mr. Norman Birkett has argued strenuously that there must be some difference between the meaning of the words "no claim shall be payable" and "there shall be no right to "recover." With all his acumen, he has failed to indicate to me that there is any real difference between the two things. I cannot see any difference between saying "no claim shall "be payable" and saying "nothing shall be recoverable." They seem to me to imply exactly the same thing; and that is, that the claimant shall not be allowed to succeed in enforcing his claim unless he shall have fulfilled the condition. It is, as I construe it, a condition to give this information within a reasonable time. That has not been fulfilled; and the claim, therefore, cannot be enforced.

One other case I should refer to is *Weir* v. *Northern Counties of England Insurance Co.* (1) The case was decided by the Irish Common Pleas Division in 1879. I need not deal with it in detail, because I think that the difference between it and the case before me can be stated quite shortly. In that case there was a provision that notice should be given within fifteen days, and that accounts, vouchers, and so forth, such as might reasonably be required, should be given. Then the clause goes on: "and, in default thereof, no claim in respect "of such loss or damage shall be payable until such notice, "account, proof and explanation respectively are given and "produced." As the Court points out in that case, if the clause had stopped at the word "payable" it would have construed the provisions as conditions precedent, and a man who had not delivered his account within fifteen days would have been held to be barred by that condition from recovering. But, the Court points out, the clause does not stop there, but it goes on with the words "until such notice, account, proof "and explanation respectively are given and produced," showing clearly that there was an extension of time contemplated, within which the claimant might deliver his notice, and might repair his fault, and place himself in the position of being able to recover. The condition in the policy in the present case does not, as I read it, mean anything of the kind. It does not say: "No claim shall be payable until such proof "shall be given." It says: "No claim shall be payable "*unless* the terms of the Condition have been complied with." It means exactly the same as if it had said: "No claim shall "be payable if the terms have not been complied with, or if "default has been made in complying with the terms."

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(1) 4 L. R. Ir. 689.

The result of it is that in my view the arbitrator was correct in refusing to give effect to the contentions of the claimant, and correct in holding, as he did, in paras. 11, 12 and 13, that failure to deliver the information required within a reasonable time of the requiring of it constituted a fatal bar to the claimant's right to recover in respect of this loss. What is to follow from that is decided by the arbitrator in para. 15 of his award. This means a dismissal of the appeal, with costs.

Norman Birkett K.C. Your Lordship did not deal, at any rate expressly, with the submission that I made, that the learned arbitrator ought to have regarded the situation at the arbitration as being equivalent to the fulfilment of the condition. I do not know whether it was your Lordship's intention so to do?

BRANSON J. I thought I had dealt with that by deciding that, in my view, this was a final bar.

Solicitors for the claimant: *Philip Conway, Thomas & Co.*
Solicitor for the respondents: *Wm. Chas. Crocker.*

A. W. G.

BANK OF ATHENS SOCIÉTÉ ANONYME *v.* ROYAL EXCHANGE ASSURANCE.

1938
Feb. 1.

[1933. B. No. 3174.]

Practice—Interest on judgment or debt—Discretion of Court—Retrospective effect of Act—" In any proceeding tried in any court of " record "—Law Reform (*Miscellaneous Provisions*) *Act*, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 3, *sub-s.* 1.

Sect. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, empowers the Court to award interest " on the whole " or any part of the debt or damages for the whole or any part " of the period between the date when the cause of action arose " and the date of the judgment " :—

Held, that the application of that section is not restricted to proceedings begun after the Act had come into force. The section gives the Court a discretion to award interest in any proceeding, whenever begun, whether before or after the Act.

APPLICATION.

The plaintiffs, the Bank of Athens Société Anonyme, had been the mortgagees of a Greek steamer, *Eftychia*, which was lost at sea, while on a voyage from Danzig to Venice with a cargo of coal and coke, in July, 1932. The steamer was insured with the defendants, the Royal Exchange Assurance, who, in February, 1933, after making some inquiries, paid to the plaintiffs 180*l.* on account of the loss. Subsequently they refused to make any further payment.

On July 26, 1933, the plaintiffs, as assignees of policies of marine insurance issued by the defendants upon hull, machinery and freight of the steamer *Eftychia*, issued a writ claiming against the defendants for a loss under the policies.

By their points of claim the plaintiffs as mortgagees of the steamship *Eftychia* said that they were at all material times fully interested in a policy of marine insurance issued by the defendants and dated May 4, 1932, whereby the defendants insured the steamer against perils of the sea for a period of twelve months from April 16, 1932. By para. 2 they said

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that while so insured the steamer became a constructive total loss by perils insured against by stranding. They said (para. 3) that notice of abandonment was given to the defendants on July 11, 1932, and that the defendants became liable to pay the plaintiffs as for a constructive total loss of the steamer, and they claimed accordingly.

The defendants, by their points of defence, denied that the *Eftychia* became a constructive total loss by perils insured against. By para. 3 of the points of defence the defendants said the stranding alleged in para. 2 of the points of claim was due to the wilful act of the captain at the instigation or with the connivance of the owner, with the intent of causing the steamer to become an actual or constructive total loss.

On October 7, 1936, the question of fact raised by para. 3 of the points of defence was ordered to be tried as a preliminary point. On February 8, 1937, Branson J., on the preliminary point, held that the steamer was wilfully thrown away with the connivance of the owner. This decision was affirmed by the Court of Appeal on November 17, 1937. In the Court of Appeal the owner was joined as plaintiff, and it was stated that he had paid off the mortgage and he carried on the appeal in his own name.

In the action the defendants counterclaimed the return of the 180*l.* which they had paid to the plaintiffs in February, 1933, and the plaintiffs, though innocent mortgagees, consented to judgment for 180*l.* in favour of the defendants with costs.

An application was now made on behalf of the defendants that interest should be paid on the 180*l.* for the period during which it had been in the hands of the plaintiffs. This application was made under s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, which provides that "In any proceedings tried in any court of record for the "recovery of any debt or damages, the court may, if it thinks "fit, order that there shall be included in the sum for which "judgment is given interest at such rate as it thinks fit on "the whole or any part of the debt or damages for the whole "or any part of the period between the date when the cause "of action arose and the date of the judgment."

Cyril Miller for the defendants. Under s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934, the Court has an absolute discretion to add interest to the judgment for 180*l.*

W. L. McNair for the plaintiffs. The Court has no power to award the interest claimed. The Law Reform (Miscellaneous Provisions) Act, 1934, is not retrospective. The Act of 1934 did not come into force until July, 1934, and does not apply in this case because the 180*l.* was paid over in February, 1933.

BRANSON J. This application raises a point on s. 3, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1934. I think that on the true construction of that section the Court in any proceeding, whenever commenced, whether before or after the Act, has the discretion which the section gives it. The words as they stand are applicable in that sense. If it was intended to restrict the application to proceedings begun after the Act had come into force, I think one would have expected to find appropriate words in the section. I therefore consider that I have the jurisdiction and discretion which the section gives. With regard to the exercise of it, I do not think that one need discuss the question of how the money came to be paid over to the plaintiffs, and when it was paid. The plaintiffs have in their pockets 180*l.* which now appears to have been the defendants' money, and I suppose earning interest since February 3, 1933. I see no reason in fairness, now that the Court is going to order that by consent the 180*l.* is to be paid over to the defendants, that that payment should not be accompanied by a reasonable rate of interest as from February 3, 1933. What that rate of interest should be is a matter, to some extent, of guesswork. I should say 4 per cent.

There may be some difficulty in entering this judgment, because the action has not been set down for trial in the Associates' department. The preliminary point has been

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BANK OF ATHENS SOCIÉTÉ ANONYME v. ROYAL EXCHANGE ASSURANCE.

tried; the action itself has never been set down for trial. It might be better if a consent summons were brought before me in the event of difficulty.

Order for interest accordingly.

Solicitors for the defendants: *Richards, Butler, Stokes & Woodham Smith.*

Solicitors for the plaintiffs: *Ince, Roscoe, Wilson & Glover.*

T. W. M

TIMES FURNISHING COMPANY, LIMITED *v.* HUTCHINGS AND ANOTHER.

1938
Jan. 25,
26, 31.

Hire-purchase agreement—Termination if "landlord of hirer takes any "step to levy distress for rent"—Distress levied for rent—Whether goods still "comprised in hire-purchase agreement"—Whether goods in possession of hirer by consent of true owner so that hirer reputed owner thereof—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4, *sub-s.* 1.

By a clause in a hire-purchase agreement made between the plaintiffs and a hirer it was provided that "this agreement, and "the company's consent to the hirer's possession of the furniture "comprised therein, shall automatically determine and come "to an end . . . . if any landlord of the hirer threatens or "takes any step to levy a distress for rent upon the furniture "of or in possession of the hirer. . . ."

During the continuance of the agreement the hirer was in arrear with his rent, his landlord signed a distress warrant, and a distress was levied, some goods which were the property of the plaintiffs and were in the possession of the hirer under the hire-purchase agreement being seized. The plaintiffs served on the bailiff a declaration pursuant to s. 1 of the Law of Distress Amendment Act, 1908, that the goods were their property; but the goods were sold. In an action brought by the plaintiffs against the landlord and the bailiff for illegal distress:—

Held, that the effect of the clause in the agreement was that when the landlord signed the distress warrant and so took a "step to levy a distress for rent" the agreement automatically determined and the goods were no longer "comprised in any "hire-purchase agreement" within s. 4, sub-s. 1, of the Act of 1908 so as to exclude the operation of ss. 1 and 2 of that Act, under which the plaintiffs brought the action, but that at the time of the distress the goods were "in the possession, order, or disposition" of the hirer "by the consent and permission of the true owner in "such circumstances that" the hirer was "the reputed owner "thereof," within s. 4, sub-s. 1, since, in the absence of any steps by the plaintiffs to indicate their intention to withdraw their consent and to assert their right to the goods which had been left in the possession, order, or disposition of the hirer, the clause in the agreement did not operate automatically to determine the consent of the plaintiffs, and the defendants were, therefore, entitled to succeed.

ACTION tried by Humphreys J. without a jury.

By an agreement dated January 17, 1936, and made between the plaintiff company and James Joseph Johnson, the company for good consideration agreed to let and Johnson agreed to hire certain furniture at a rent of 6*s.* 6*d.* a week, it being provided that the furniture should become the property of the hirer on payment by him to the company of the value of the furniture as specified in the schedule to the agreement. The agreement further provided, by clause 8: " . . . . this "agreement, and the company's consent to the hirer's possession "of the furniture comprised therein, shall automatically determine and come to an end . . . . if any landlord of the hirer "threatens or takes any step to levy a distress for rent upon "the furniture of or in possession of the hirer. . . . ."

The first defendant, Hutchings, was at all material times the landlord of premises at Chislehurst, Kent, of which Johnson was the tenant.

On July 6, 1936 (on which date Johnson had not become entitled to exercise, nor had he exercised, the option of purchase contained in the agreement), Johnson owed Hutchings 10*l.* 14*s.* for rent of the premises and Hutchings was then entitled to distrain for that rent. On July 7 Hutchings signed a warrant authorizing the second defendant, Craggs, a certificated bailiff, to levy a distress to recover the rent. On July 8 Craggs levied distress and seized certain goods which were the property of the plaintiff company and were in Johnson's possession under the agreement of January 17, 1936. On July 15 the plaintiff company served on the defendant Craggs a declaration pursuant to s. 1 of the Law of Distress Amendment Act, 1908 (1), setting forth that Johnson had no right in the furniture distrained or threatened to be distrained on but that it was the property of the plaintiff company. On September 23 the defendants, Hutchings and Craggs, sold the goods for 13*l*. 10*s*. 6*d*. It was agreed that at the time when the landlord signed the distress warrant the goods were in Johnson's possession in such circumstances that he was the apparent owner of them and that up to that time they were in Johnson's possession by the consent and permission of the company.

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(1) By the Law of Distress Amendment Act, 1908, ss. 1 and 2, a person not being the tenant of premises may serve a landlord levying a distress on any furniture, etc., for arrears of rent with a declaration setting forth that the tenant of the premises has no right in the furniture, etc., so distrained or threatened to be distrained on and that such furniture, etc., is the property or in the lawful possession of such other person, and if the landlord thereafter shall proceed with a distress on the furniture, etc., he shall be deemed guilty of an illegal distress.

By s. 4: "This Act shall not "apply—(1.) . . . . to goods com- "prised in any . . . . hire- "purchase agreement . . . . nor "to goods in the possession, order, "or disposition of such tenant by "the consent and permission of "the true owner under such cir- "cumstances that such tenant is "the reputed owner thereof. ". . . ."

In November, 1936, the plaintiff company brought the present action under ss. 1 and 2 of the Act of 1908 against the defendants claiming damages for illegal distress.

Wallington K.C. and *T. F. Davis* for the plaintiffs. The plaintiffs are entitled to judgment. The effect of clause 8 of the agreement was that when, on July 7, the defendant Hutchings signed the distress warrant and so took a "step "to levy a distress for rent upon the furniture of or in possession of the hirer," Johnson, there ceased to be a hire-purchase agreement in existence and the furniture ceased to be in the possession, order, or disposition of Johnson "by the consent "and permission of the true owner under such circumstances "that such tenant is the reputed owner thereof" within s. 4 of the Law of Distress Amendment Act, 1908. The provisions of ss. 1 and 2 of the Act are, therefore, not prevented from applying to the case and the defendants are to be deemed guilty of an illegal distress. A distress on goods which are the subject of a hire-purchase agreement is illegal if it is levied after the termination of the agreement: *Smart Bros.* v. *Holt.* (1)

Astell Burt (*Cloutman* with him) for the defendants. The defendants are entitled to the protection of s. 4 of the Act, because clause 8 never determined the agreement. The occurrence of an event contemplated by such a clause cannot automatically terminate an agreement. There must be some act by the owner of the goods effectively to determine his consent to their possession by the hirer and to negative the hirer's reputed ownership: *Smart Bros.* v. *Holt* (1);

(1) [1929] 2 K. B. 303.

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Jay's Furnishing Co. v. *Brand & Co.* (1) This proposition is amply established by decisions under the Bankruptcy Acts, which have long contained provisions substantially in the same terms as s. 4 of the Act of 1908: Williams on Bankruptcy, 15th ed., p. 302; *In re Ginger.* (2) The reason in both branches of the law is clear—namely, to prevent innocent third parties being prejudiced. Here the landlord is an innocent third party. Moreover, the landlord cannot be affected adversely by an agreement to which he was not a party and of which he had no notice: *Hickenbotham* v. *Groves.* (3) In any case, clause 8 renders the agreement voidable and not void and the plaintiffs never took any step to give notice of avoidance: *Doe* d. *Bryan* v. *Bancks* (4); *Roberts* v. *Davey* (5); *Elliott* v. *Boynton*, per Pollock M.R. (6)

Cur. adv. vult.

1938. Jan. 31. HUMPHREYS J. The plaintiffs bring this action under s. 2 of the Law of Distress Amendment Act, 1908, which provides, among other things, that if any landlord "shall, after being served with the beforementioned declaration "and inventory . . . . levy or proceed with a distress on the "furniture, goods, or chattels of the" other person who has served the notice, he shall be "deemed guilty of an "illegal distress." By their defence the defendants rely on s. 4 of the Act, which specifies various sets of circumstances in which the Act is not to apply. Those which are said to apply to this case are contained in the words: "This Act "shall not apply . . . . to goods comprised in any . . . . hire-"purchase agreement . . . . made by such tenant, nor to "goods in the possession, order, or disposition of such tenant "by the consent and permission of the true owner under such "circumstances that such tenant is the reputed owner thereof."

The plaintiffs contend that s. 4 has no application to the present case by reason of the terms of clause 8 of the hire-purchase agreement, and whether or not that contention is sound is the question which falls for my decision. I am told that this case is regarded as of some importance and I think that may well be so. It is not disputed that clause 8 was inserted in the agreement to oust the provisions of s. 4 of the Act and thereby protect goods on hire-purchase in the possession of a tenant unable to pay his rent from being distrained on for the unpaid rent. Mr. Wallington has argued that by virtue of clause 8 the goods, which had admittedly been subject to the hire-purchase agreement and in the possession, order, or disposition of the hirer with the consent and permission of the true owners, ceased to be the subject of the agreement and ceased to be retained by the hirer with the consent and permission of the owners on July 7 when the defendant Hutchings signed the distress warrant and thereby, in the language of clause 8, took a step to levy a distress. The position so created is obviously a slightly artificial one, but it may for all that be effective for the purpose for which it was intended. Mr. Wallington relied on *Smart Bros.* v. *Holt.* (1) That case would, in my opinion, be conclusive in this matter if the plaintiffs had proceeded, not under clause 8 as they did, but under another clause of the agreement, clause 7 (*b*), which provides as follows: " In case of any "breach " of any of the terms of the agreement "the company "may . . . . by written notice sent (by post or otherwise) "to or left at the hirer's last-known address forthwith and "for all purposes absolutely determine and end this agreement "and the hiring thereby constituted and thereupon the hirer "shall no longer be in possession of the furniture with the "company's consent nor shall either party thereafter have "any rights hereunder." The terms of that clause are identical with the terms of the clause in *Smart Bros.* v. *Holt.* (1) In that case the owners of the goods gave the notice referred to in the clause and the Court held that thereby the agreement was effectively determined so that it became absolutely void and neither party had any right under it,

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(1) [1915] 1 K. B. 458.
(2) [1897] 2 Q. B. 461.
(3) (1826) 2 C. & P. 492.
(4) (1821) 4 B. & Ad. 401.
(5) (1833) 4 B. & Ad. 664.
(6) [1924] 1 Ch. 236, 246.

(1) [1929] 2 K. B. 303.

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and, therefore, that when the distress was levied, which was more than a week after the notice had been sent, there was no hire-purchase agreement in force relating to the goods. I think that it must be taken, although the question does not seem to have been much argued, that in those circumstances the consent of the owner to the retention by the hirer of the goods which had been on hire-purchase ceased. In the present case, however, that authority is not in point, because the proceedings taken by the landlord in *Smart Bros.* v. *Holt* (1) were quite different from the proceedings taken here. The question here is not concerned with the effect of the true owner taking the steps indicated by the agreement to put it to an end. It is whether, if the owner takes no steps, the agreement is automatically determined by virtue of a different clause in the agreement.

Mr. Astell Burt has taken a number of points. On the question whether, in the language of s. 4, sub-s. 1, at the date of the distress the goods were "goods comprised in any "hire-purchase agreement" made by the tenant, Mr. Burt first took the point that the hire-purchase agreement could not affect the landlord because he was not a party to it. It seemed to be a courageous point to take, because, while it is elementary that persons are not bound by agreements to which they are not parties, it is equally clear that the rights of persons are every day affected by agreements to which they are not parties. Indeed, it is not suggested, and could not be suggested, that, if certain steps had been taken by one of the parties to the agreement, the rights of the landlord would not have been affected, although the landlord was no party to the agreement. In support of that proposition, Mr. Astell Burt cited *Hickenbotham* v. *Groves*. (2) I confess that I have had some difficulty in making up my mind how to deal with that case. It is a report, not of any decision by a judge, but of a summing-up by Abbott C.J. to a jury, and the summing-up of a judge to a jury is never intended to be a complete exposition of the law on any subject. It is merely an indication to the jury of such legal matters as are

(1) [1929] 2 K. B. 303.

(2) 2 C. & P. 492.

necessary for them to understand that they in their turn may arrive at a true decision on the facts. While I would not be presumptuous enough to doubt that the summing-up was admirable for the purpose of that case, I must bear in mind that it was delivered on the facts of the particular case. What is most relied on by Mr. Burt is a passage in that summing-up in which, referring to a deed which contained a clause that the plaintiff should resume possession of furniture if one Hodgson should commit "any act of bankruptcy, on which "any commission of bankruptcy should issue," the learned judge says (1): "But those were private contracts between "these parties, and being unknown to the world, they will "not help the plaintiff, if you think that these goods were in "the order and disposition of the bankrupt." I think that it is sufficient to say that I cannot accept that case as an authority, nor do I think that the learned judge for a moment intended that it should be regarded as an authority, for the proposition that in such cases as the present the right of the landlord to the goods should not be affected by an agreement entered into by third parties who were unknown to him. The case is one which I am told, and I think rightly, is not referred to in the leading book on bankruptcy cases, Williams on Bankruptcy. The question of the consent of the true owner to the goods being in the order and disposition of the bankrupt, and whether that consent was abrogated or not, does not seem to have been argued.

The next point which was taken by Mr. Burt was that, on the true construction of clause 8 of the agreement, taking the agreement as a whole, the expression that the agreement "shall automatically determine and come to an end" did not make the contract void, but only voidable, and admittedly there was no notice to terminate the agreement given by either party. He relies for that proposition on certain Chancery cases dealing with, I think, in every case, either a lease or such a matter as a licence to mine, and there is no doubt that a long series of cases show, as was stated by Pollock M.R. in *Elliott* v. *Boynton* (2), that "a provision that a lease shall

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(1) 2 C. & P. 496.

(2) [1924] 1 Ch. 236, 246.

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"be void on a breach of covenant or conditions by the lessee "means that the lease is voidable only at the option of the "lessor." I accept that, with great respect, with regard to leases and licences, but I think, with regard to agreements such as that with which we are dealing here, that the law is as stated by Lord Atkinson when giving his opinion in the House of Lords in *New Zealand Shipping Co., Ld.* v. *Société des Ateliers et Chantiers de France.* (1) The passage is so illuminating that I think it is worth reading the whole of it, although only a part of it is directly applicable to the question which I have to determine. Lord Atkinson said: "It is undoubtedly competent for the two parties to a contract "to stipulate by a clause in it that the contract shall be void "upon the happening of an event over which neither of the "parties shall have any control, cannot bring about, prevent "or retard. For instance, they may stipulate that if rain "should fall on the thirtieth day after the date of the contract, "the contract should be void. Then if rain did fall on that "day the contract would be put an end to by this event, "whether the parties so desire or not. Of course, they might "during the currency of the contract rescind it and enter "into a new one, or on its avoidance immediately enter into "a new contract. But if the stipulation be that the contract "shall be void on the happening of an event which one or "either of them can by his own act or omission bring about, "then the party, who by his own act or omission brings that "event about, cannot be permitted either to insist upon the "stipulation himself or to compel the other party, who is "blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take "advantage of his own wrong, in the one case directly, and "in the other case indirectly in a roundabout way, but in "either way putting an end to the contract. The application "to contracts such as these of the principle that a man shall "not be permitted to take advantage of his own wrong thus "necessarily leaves to the blameless party an option whether "he will or will not insist on the stipulation that the contract

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(1) [1919] A. C. 1, 9.

"shall be void on the happening of the named event." Applying those principles to this case, it seems to me to be clear that, while it would not have been in the power of the hirer, Johnson, to insist on the avoidance of this contract because of his own breaches, and it is quite clear that he committed breaches of the contract by failing to pay his rent, the plaintiffs, who are, within the description of Lord Atkinson, "the blameless parties," are entitled, if they desire, to have it held that the contract is void. That is my view. If, as between the two parties to the contract, it is void at the option of the plaintiffs, I cannot understand any principle of law, nor has any authority been cited to me, to support the proposition that it can be kept alive to alter the rights of some third party.

The final point taken by Mr. Burt on this part of the case was that, if the whole of this hire-purchase agreement is read, it is found that, although by clause 8 the contract is said on the happening of a certain event to be automatically determined and come to an end and neither party is to have any right under it, yet in truth, as appears by other clauses, and in particular clause 7, other things remain to be done. In *Smart Bros.* v. *Holt* (1) and *Jay's Furnishing Co.* v. *Brand & Co.* (2), which is referred to in *Smart Bros.* v. *Holt* (1), it was held that in the circumstances of those cases a contract did not become absolutely void but only voidable, and Mr. Burt says that that applies to the present case. The point is an attractive one, but I think that the true answer is that made by Mr. Wallington—namely, that in this case one must construe these clauses, dealing as they do with different events, separately, that clause 8 must be taken by itself, and that the Court must first decide whether clause 8 is effective to put an end to this contract. If it is, there is nothing further to be done. The mere fact that by clause 7 if different steps had been taken there would have remained something for the parties to do is no reason for saying that the contract is not automatically determined as provided by clause 8.

(1) [1929] 2 K. B. 303.

(2) [1915] 1 K. B. 458.

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On the point, therefore, made by Mr. Burt that at the date of the distress the goods were still comprised in the hire-purchase agreement, I think that the plaintiffs are right. I now come to his other point. He says that, quite apart from the contract, this is a case in which the goods remained in the "possession, order, or disposition of the tenant by the "consent and permission of the true owner under such cir-"cumstances that such tenant is the reputed owner thereof." For that proposition he relied on a series of cases which, I think, without exception, were bankruptcy cases. It appears to be the fact that since the reign of James I. all the Bankruptcy Acts have had in them a provision which is, so far as is material, identical in language with that used in s. 4, sub-s. 1, of the Law of Distress Amendment Act, 1908. Therefore, the bankruptcy cases are relevant in the present action, and I think that Mr. Burt is right in saying that those cases show that, where goods have been in the "possession, order, or "disposition" of another party by the consent and permission of the true owner and the true owner seeks to establish that he has retracted that consent and permission, he must show that he has taken some steps to indicate his intention, and probably that he has taken some steps to recover the goods, so that no person can say that the tenant has continued to be the reputed owner of the goods, as he has been up to that time. There are a few words in one of the cases to which I think it sufficient to refer. That is *Rutter* v. *Everett* (1), in giving judgment in which Stirling J., quoting Turner L.J. in *Bartlett* v. *Bartlett* (2), said: "How is the true owner to prevent the "reputed ownership? How can it be prevented otherwise "than by notice to the person who is under liability in respect "of the chattels? The law has said this is the mode of "preventing reputed ownership as to debts; and is there to "be one law as to debts and another as to legacies? The "plain object of the statute is, that the true owner shall not "permit the order and disposition to remain with the bankrupt; "and if he does not take the steps which are necessary to "prevent it, surely he must be taken to permit it." In my

(1) [1895] 2 Ch. 872, 878. (2) (1857) 1 De G. & J. 127.

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opinion, that principle is quite inconsistent with the notion that the "consent and permission" of an owner which is clearly established up to a point can be deemed to be withdrawn when no steps have been taken by the owner to assert his right to the goods and the goods are left in the possession, order, or disposition of the tenant.

For that reason, I have come to the conclusion that the consent and permission which undoubtedly was given by the plaintiffs to the goods being in the possession, order, or disposition of the tenant, Johnson, so as to render him the reputed owner, at the time when the hire-purchase agreement was entered into and the goods delivered, was never effectively determined, and that I cannot give effect to clause 8 of the agreement so as to cause it to operate in the same way as would a notice or some other act by the true owner to determine that consent. For that reason, I think that s. 4 of the Act applies and the defendants have made out their defence. It follows that my judgment must be for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Lewis Lloyd & Co.*
Solicitors for defendants: *R. H. King & Co.*

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MORGAN *v.* SCOULDING.

[1937. M. No. 1674.]

Damages—Negligence—Practically instantaneous death of injured person—Claim by administrator of deceased's estate—Claim for shortening of expectation of life—Survival of cause of action—Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1.

As a result of the negligent driving of a motor-car by the defendant, the deceased, riding a motor-cycle, was killed, practically instantaneously. The plaintiff, his administrator, by virtue of the Law Reform (Miscellaneous Provisions) Act, 1934, brought an action claiming damages (inter alia) for the shortening of the expectation of life of the deceased. It was contended for the defendant that no cause of action had vested in the deceased, by reason of the instantaneous character of his death, and, consequently, that no such cause survived to the plaintiff :—

Held, that the cause of action was the negligence of the defendant, which happened before the death, and which caused damage, (inter alia) loss of expectation of life, to the deceased, which cause of action vested in the deceased before his death, and, consequently, by virtue of the Act, survived to the plaintiff.

ACTION tried by Lewis J.

The plaintiff, as the father and administrator of his son, Edward William Morgan, deceased, claimed damages under Lord Campbell's Act, 1846 (9 & 10 Vict., c. 93), and under the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 1, in respect of the death of his deceased son while riding a motor-cycle caused, as the learned Judge found, by the negligence of the defendant while driving a motor-car. It was pleaded that the deceased was killed instantaneously. After the collision the motor-cycle went across the road and the deceased struck his head on the kerb, which was the cause of death. No application was made to amend the pleadings.

Alban Gordon for the plaintiff. The claim for damages for loss of expectation of life is based on *Rose* v. *Ford*. (1) In that case four days supervened between the accident and the death, whilst here it was almost instantaneous ; but it is to enter into the region of metaphysics if one begins to estimate the time elapsing between the impact and the death. The question is whether the cause of action, i.e., the negligence of the defendant and consequential damage to the deceased, occurred before or after the death, and, if it occurred before, it is immaterial how long before. In that event a cause of action vested in the deceased, and that cause continues in the plaintiff. The death is not the cause of action; it only makes it unnecessary to call evidence to prove that the life has been shortened. In the present case there was an appreciable interval between the impact and the crushing of the deceased's head on the kerb.

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(1) [1937] A. C. 826.

R. O'Sullivan K.C. and *Reginald Knight* for the defendant. Death is the damage alleged in this case, and death cannot give a cause of action: *Baker* v. *Bolton.* (1)

[LEWIS J. Surely the point is whether any cause of action vested in the deceased before he died. Do you contend that such a right vested if he lived for five seconds after the collision, but not if he died instantaneously ?]

Yes. There must be ability in a living person to make a claim, and, unless he can do so, no right of action can be vested in him so as to pass to his administrator. The statute of 1934 does not create a new cause of action, but only continues a cause of action already vested in a deceased person. In *Rose* v. *Ford* (2) four days elapsed between the accident and the death; the death in this case is pleaded as occurring instantaneously.

LEWIS J. In this case the father of a young man of twenty-three is suing on his own behalf, and in his capacity of administrator of his dead son, Edgar William Morgan, both under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, Mr. Thomas Frederick Scoulding, whose negligence, as it is alleged, caused injuries to Edgar William Morgan, from which injuries he died.

[His Lordship discussed the evidence, and came to the

(1) (1808) 1 Camp. 493.

(2) [1937] A. C. 826.

conclusion that the death of the deceased was due to the negligence of the defendant. The deceased had collided with the car, not very severely, but the cycle went across the road and the deceased was killed by his head striking the kerb. His Lordship continued :]

A most interesting discussion and argument have taken place in this case with regard to the Law Reform (Miscellaneous Provisions) Act, 1934. Putting it shortly, in words which I hope will not do injustice to Mr. O'Sullivan's very able argument, he says that no person who sues in the position of an administrator of the estate of a deceased man can recover damages for the loss of the expectation of life, or, indeed, any damages for the estate, unless there existed before the death of the deceased a cause of action in him, the deceased man. Mr. O'Sullivan quite properly points out that this Act did not create any new causes of action. All it did was this : in a case where A. has a right of action, but dies before that right of action can be enforced, according to the old law, the action abated ; but now, if A. has a cause of action, his or her death does not prevent his or her representatives filling the gap and carrying on that action as though the deceased person was still alive. That is to put the point in a nutshell. Mr. O'Sullivan says that the result of that is that, where a person is killed instantaneously, that person has never acquired a right of action, and therefore there is nothing which comes down to the administrator.

That argument has given rise to a very interesting discussion. What has to be borne in mind is that, in cases where actions are brought arising out of accidents resulting in death, the wrong done is not strictly the death ; the wrong done which gives rise to the cause of action is the injury which may or may not sooner or later result in death. A person who is still alive can and always has been able to bring an action in such circumstances and say : "As part of my damages "I want something for my loss of expectation of life." It is not necessary that the person should be dead in order that the action should be brought. If he is dead, as was pointed out in the case of *Rose* v. *Ford* (1) which has been discussed at some length, the only effect is that the administrator who is bringing the action is in a much better position to lay before the Court what the loss of the expectation of life has been. (2) When the plaintiff is still alive it may be that some medical man will say: " He is a man who ought "to have lived until seventy, you have injured him at forty, "and he has probably only got another five years to live." That is pure speculation, based, of course, on medical knowledge, and there may be one doctor who will give the plaintiff one year to live and another doctor twenty years to live. I have been told in the course of this case by Mr. O'Sullivan that medical opinion differed very much in a particular case he was in; one set of doctors said that the man would not live more than a year—that was three and a half years ago—and the man is still alive. That instance illustrates how doctors may err upon these matters.

The only real effect that the death has in this connection is that it enables the Court far more easily to gauge how much of the man's life has been lost by reason of the fact that he has been killed. Although the point which Mr. O'Sullivan has taken is one of extreme interest, he bases himself on the actual words of the section and on certain sentences used by the learned Lords in the case of *Rose* v. *Ford* (1), and I think the answer to it has been put quite correctly by counsel for the plaintiff. He says that you cannot go into all these metaphysical discussions, because all that matters is that the injury should have occurred before the death. As I have said, the injury is not strictly the death; no person could have a right of action arising out of the death of a third person, but if the person who is killed, before he dies, has a right of action, then that right of action now descends to the administrator.

It seems to me that the proper way of looking at these cases is this: What was the cause of action? In this case the cause of action was the defendant negligently colliding with the deceased, whereby the deceased

(1) [1937] A. C. 826.

(2) Ibid. 846.

was thrown from his bicycle and killed. The cause of action was not the death, but the negligence of the defendant in colliding with the deceased man on his motor-cycle. That happened before the death, and, although there may have only been a split second, or a very short interval of time, between that collision and the man's death, the cause of action arose before his death. If it did arise before his death, then that cause of action would descend to the administrator. That, I think, is the answer to the extremely interesting argument put forward by Mr. O'Sullivan.

I hope, for a great many reasons, that my conclusion is the right one, because it seems to me that if I am not right it is going to lead to all sorts of complications. Evidence may be called to show that the man lived for five seconds after the accident or ten seconds after the accident, and it seems to me that it would be impossible in ninety-nine out of a hundred cases to say whether a man had been killed instantaneously; that in the same fraction of a second as the injury was sustained he died. If the Court is reduced to that, there will be still greater difficulties in administering this particular Act of Parliament. Simply because I see many difficulties if I am not right, is, of course, no reason for deciding the case in the wrong way; but I think Mr. O'Sullivan's point is not a good one.

Therefore, I find that the plaintiff, as administrator of the deceased man, is entitled to recover damages in respect of the death of his son. The special damage to an amount of 84*l.* 12*s.* 3*d.* has been admitted. The boy who was killed brought into the household, and, no doubt, he actually paid it to his mother who is the housekeeper, 35*s.* a week. 1*l.* of that was expended on the boy himself; that is to say, it cost about 1*l.* to keep him at home, so that the mother or the housekeeping fund in general was in credit from that payment to the extent of 15*s.* a week. How long that would have gone on, which is a matter I have to consider, one does not know. He was only twenty-three; he was in a very good position apparently, and it was apparently hoped that in time he would give up the position at which he was earning

4*l.* a week and become the licensee of some public-house which his father would acquire. His father has told me that he knew his son was not engaged to any lady and had no immediate prospects of getting married. In those circumstances one has to speculate as to how long this sum of 15*s.* a week would be coming into the household. The only data I have is that he was hoping to become the licensee of a public-house, and he would perhaps still continue to pay something towards the keep of his father and mother; apparently his affections were not engaged elsewhere, and he might have remained a bachelor. On those facts one has to try to arrive at some figure for the loss which the father and mother have suffered. I think that to meet that loss the sum of 300*l.* should be awarded under Lord Campbell's Act.

With regard to the other point, it seems to me, speaking for myself, a most extraordinarily difficult task to assess the loss of the expectation of life. I have considered it in the light of what was said in *Rose* v. *Ford* (1) and other cases, and what has been said since then in the case which my brother Greaves-Lord J. decided the other day (2), and I think that the proper sum to award under the Law Reform (Miscellaneous Provisions) Act is 1000*l.*

Solicitors for plaintiff: *Berry Tompkins & Co.*
Solicitor for defendant: *W. Stanley Eastburn.*

(1) [1937] A. C. 826.
(2) *Turbyfield* v. *Great Western Ry. Co.* [1938] W. N. 12.

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CROSS (INSPECTOR OF TAXES) *v.* LONDON AND PROVINCIAL TRUST, LIMITED.

Revenue—Income Tax—Bearer Bonds—Default in interest payments—Funding plan—Issue of funding bonds—Exchange of bonds for interest coupons—Sale of funding bonds—Liability to income tax on funding bonds—Whether " income arising from securities out of "the United Kingdom"—Assessment by Commissioners—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case IV.*

The respondent company was the holder of certain gold bearer bonds of the United States of Brazil. The Brazilian Government, being unable to pay the interest as it fell due, put forward a funding plan, under which holders might exchange their interest coupons as they fell due for twenty-year funding bonds, carrying interest at five per cent. The respondent company from time to time sold the funding bonds which they had received. For the years 1933–34 and 1934–35 the respondent company were assessed to income tax under Case IV. of Sch. D in sums intended to represent the value as at the dates of issue of certain of the funding bonds received and sold by them.

The claim for tax having been rejected by Finlay J., the Crown appealed.

The question for the determination of the Court was, were the funding bonds when received, " income arising from securities "out of the United Kingdom" within Case IV. of Sch. D of the Income Tax Act, 1918. It was contended on behalf of the Crown that they were money's worth received in satisfaction of interest payable under the original bonds. The respondent company contested this and contended that they had received no income from bonds, in that all they had received was a substituted promise to pay the interest at a future date with interest thereon in the meantime :—

Held (affirming Finlay J. [1937] 2 K. B. 718), that where a debtor defaults and the appropriate income being money is not changed into something else but remains money which the debtor promises to pay at a later date, it cannot be said that the security has produced any income. The form of the funding bond was nothing but a promise to pay at a future date the interest in respect of which default had been made. The respondent company was not therefore assessable to income tax under Case IV. of Sch. D of the Income Tax Act, 1918, in respect thereof.

Commissioner of Income-tax, Bihar and Orissa v. *Maharajadhiraja of Darbhanga* (1933) L. R. 60 I. A. 146, 161, and *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar and Orissa* (1933) L. R. 60 I. A. 133, 137, 138, 139, followed.

APPEAL from the decision of Finlay J. on a Case stated by the Special Commissioners of Income Tax.

The respondents were the holders of certain gold bonds issued by the United States of Brazil. The bonds were dollar bonds with interest coupons annexed, which were payable in dollars in New York or, at bearer's option, in London in sterling at a conventional rate of exchange. In March, 1932, a circular was issued on behalf of the Brazilian Government giving notice that it was compelled to suspend payment of interest on these bonds and stating its decision to fund the interest during a period not exceeding three years. This funding operation was to be carried out by the issue of twenty-year funding bonds carrying interest at five per cent. which were to be issued in exchange for coupons of a like nominal amount as they matured. The respondents surrendered the coupons on their bonds as they fell due and received funding bonds in exchange. These bonds had a value in the market at the date of receipt.

The funding bonds contained a promise by the Brazilian Government "for value received" to pay to the bearer on October 1, 1951, the nominal amount appearing on the face of the bond (described as "the principal sum"), unless the bond had previously been redeemed, and a promise to pay interest on the said principal sum at the rate of five per cent. per annum. Both principal and interest were payable in New York or London at bearer's option. The bonds were expressed to have been issued pursuant to a "general bond" of October 1, 1931, under which they were entitled to the benefits of an accumulative sinking fund commencing in 1934 which was to be applied in the purchase of bonds below par or in redemption at par by semi-annual drawings. Attached to the bonds were interest coupons.

The "general bond" contained undertakings by the Brazilian Government to provide the paying agents with funds necessary for the interest and sinking fund service of the funding bonds. Clause 8 (*b*) of the general bond provided that the holder of a coupon of the original bonds which was not exchanged for funding bonds was to be entitled on presentation of the coupon at the office of the paying agents to receive a sum equal to the principal value of the funding

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bonds which might have been issued in exchange for such coupon together with accrued interest. This right was exercisable on or after October 1, 1951, or on earlier dates, provided there were on those dates funds in the hands of the paying agents sufficient to redeem all funding bonds then either outstanding or liable to be issued.

The respondents from time to time sold the funding bonds which they had received. For the years 1933–34 and 1934–35 the respondents were assessed to income tax under Case IV. of Sch. D in sums intended to represent the value as at the dates of issue of certain of the funding bonds received and sold by them. The respondents successfully challenged this assessment before the Special Commissioners, whose decision was upheld by Finlay J. The Crown now appealed.

Sir Donald B. Somervell A.-G., J. H. Stamp, and *R. P. Hills* for the Crown. These funding bonds by their nature really represented money or something that could be turned into money—namely, money's worth. Therefore, if it was money's worth, it must follow that the respondents in receiving the funding bond must be taken to have received an income profit. This therefore is income arising from securities within Sch. D, Case IV., of the Income Tax Act, 1918. [They referred to *Commissioners of Inland Revenue* v. *Lawrence, Graham & Co.* (1); *Westminster Bank* v. *Osler.* (2)]

The question arises, Does the debtor surrender his old debt, is it cancelled and does he get something which is really marketable? This was marketable. Compare also the cases of *National Bank, Ld.* v. *Baker* (3) and *Westminster Bank* v. *Osler* (2) for the judgments of Rowlatt J., Lord Hanworth M.R. and Romer L.J. in both cases, and of Lord Buckmaster in the *Westminster* case (2) in the House of Lords. What was decided there was that when you substitute one Government debt for another, whether it was the original terms of the offer that you should do it or whether it was a new

(1) [1937] 2 K. B. 179.

(2) [1932] 1 K. B. 668, 684, 689, 690; [1933] A. C. 139, 148, 149; 17 Tax Cas. 381, 390, 396, 400, 402, 403.

(3) [1932] 1 K. B. 668; 17 Tax Cas. 381, 390, 396, 400.

offer, and the security which you received was worth more than the security which you gave, you had then received a profit, you had received one asset for another. [Reference was made to *Weight* v. *Salmon.* (1)] Here in the case now before the Court a different security has been given, the old one goes and the new one takes its place. The interest is discharged and money's worth takes its place. That is shown in the respondent Trust's accounts. The bond is a payment of the interest. [They referred to *Scottish and Canadian General Investment Co., Ld.* v. *Easson* (2); *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar and Orissa.* (3)]

A. M. Latter K.C. and *J. S. Scrimgeour* for the respondents. It is submitted that there must be payment of the interest before you can get any of the income arising under Case IV., and there is no income. All that has been received is a substituted promise to pay the interest at a future date. The nature of a mere repeated promise—whatever form it takes,—whether in the form of a promissory note to pay the interest on the coupon or by giving a new bond for it merely as a promise to pay,—is not payment. Promises are not payment: see Lord Macmillan in the case of *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Darbhanga.* (4) [Reference was also made to *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar and Orissa.* (3) See also *Commissioners of Inland Revenue* v. *Lawrence, Graham & Co.* (5), especially the judgment, where the Court discuss the cases. Compare *Marland* v. *Commissioners of Inland Revenue* (6) and *National Provident Institution* v. *Brown.* (7)]

Sir Donald Somervell A.-G. in reply.

Cur. adv. vult.

1938. Jan. 31. SIR WILFRID GREENE M.R. [after stating the facts set out above, continued:] The question involved can be stated in a few words. It is this: Were the funding bonds when received "income arising from securities out of "the United Kingdom"? The Crown says that they were money's worth received in satisfaction of interest payable under the original bonds. The respondents say that they have received no income from those bonds in that all that they have received is a substituted promise to pay the interest at a future date with interest thereon in the meantime.

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(1) (1934–35) 19 Tax Cas. 174.
(2) (1922) 8 Tax Cas. 265.
(3) (1933) L. R. 60 I. A. 133.
(4) (1933) L. R. 60 I. A. 146, 161.
(5) [1937] 2 K. B. 179, 188, 195.
(6) (1934) 19 Tax Cas. 467, 472.
(7) (1919–21) 8 Tax Cas. 57.

It is not open to question that income can be in the form of money's worth. Nor is it open to question that if the holder of a security, the contractual income from which is money, receives from the person liable to pay that money something of money's worth, namely goods, instead of the money, such goods are income arising from the security. Compare *Scottish and Canadian General Investment Co., Ld.* v. *Easson* (1), where debentures of a new company were received in place of interest due on bonds issued by an old company. On the other hand where there is a mere substitution of a promise to pay at a later date for the obligation to make an interest payment presently due, the owner of the security cannot be said to have received income from it. In such a case in truth that is exactly what has not happened, since the payment has been postponed instead of being made on its due date. Nor do I see how it can make any difference if upon the true reading of the transaction the original obligation is extinguished and the promise to pay at a later date is accepted in its place. If the holder of a mortgage agrees to accept a post-dated cheque in lieu of interest which has accrued due, it would surely be a misuse of language to say that he had received income from the mortgage, and that notwithstanding the fact (which I will assume) that the post-dated cheque was a thing of money's worth. A question of this nature arose under the Indian Income-tax Act (XI. of 1922) in *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Darbhanga*. (2) There under an arrangement between debtor and creditor the creditor took from the debtor in satisfaction of principal and interest due, certain assets and also certain promissory notes of the debtor himself, a sufficient number of which were held to be properly referable to the interest due. It was held by the Privy Council that the receipt of these notes could not be treated as the receipt of income. Lord Macmillan in delivering the judgment of the Judicial Committee said: " There is, of course, no doubt that a "liability to pay interest, like a liability to make any other "payment, may be satisfied by a transference of assets other "than cash and that a receipt in kind may be taxable income. "But for this to be so it is essential that what is received in "kind should be the equivalent of cash or, in other words, "should be money's worth: *Californian Copper Syndicate* v. "*Harris* (1); *Scottish and Canadian General Investment Co.* v. "*Easson* (2), both cited by Das J. below. Now here the first "six items, amounting to Rs.20,74,973, may perhaps reason- "ably enough be regarded as the equivalent of cash, but the "seventh item of Rs.17,34,596, consisting of the debtor's "own promissory notes, was clearly not the equivalent of "cash. A debtor who gives his creditor a promissory note for "the sum he owes can in no sense be said to pay his creditor; "he merely gives him a document or voucher of debt possessing "certain legal attributes. So far then as this item of "Rs.17,34,596 is concerned the assessee did not receive "payment of any taxable income from his debtor or indeed "any payment at all."

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(1) (1922) 8 Tax Cas. 265.

(2) (1933) L. R. 60 I. A. 146, 161.

On the same day the judgment of the Judicial Committee was delivered by Lord Macmillan in another case, that of *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar and Orissa.* (3) There the assessees, who were holders of a mortgage on which interest was in arrear, accepted in discharge of that mortgage and all sums due thereunder a new mortgage for a principal sum part of which represented the arrears of interest due under the old mortgage. The grantors of the new mortgage were not identical with the grantors of the old mortgage and the property mortgaged was greater in extent. The assessees claimed that the acceptance of the new mortgage and the extinction of the old mortgage operated as payment of the arrears of interest with the result that the amount of those arrears ought to have been brought into charge in the year in which the new mortgage was accepted. The judgment, after examining the decisions in *Californian Copper Syndicate* v. *Harris* (1); *Royal Insurance Co.* v. *Stephen* (2); and *Westminster Bank* v. *Osler* (3), summed up the result in the following words: "From these cases it is "plain that the essence of the matter is that there must be "an actually realized or realizable profit or loss." It then proceeded to point out that in receiving the new mortgage the assessees "did not thereby receive payment or the equi-"valent of payment of the principal and interest of the "original mortgage," and that notwithstanding that the mortgagors and the property mortgaged were not identical, "the substitution effected cannot in any real sense be described "as the equivalent of a realization of the original mortgage, "principal and interest. What happened was that the "assessees received a new and substituted security for an "existing debt. To give security for a debt is not to pay a "debt. If the assessees had received payment in kind of the "amount outstanding on the original mortgage, in the shape, "say, of realizable shares or bonds, the case would have been "different, but they merely received further and better "security for their debt. It is, in their Lordships' view, quite "immaterial that the assessees discharged the original mort-"gage and all liability under it, for that was merely an incident "in the transaction whereby the new security was substituted "for the old." It is clear that the "realizable shares or "bonds" referred to in this passage are shares or bonds issued by some company, since the assessees were individuals and the expression therefore could not refer to some such security issued by them. It is to "realizable" things of this character that the phrase "realizable profit or loss" in the passage first cited from the judgment clearly refers.

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(1) [1904] 6 F. 894; 5 Tax Cas. 159.
(2) 1922 S. C. 242; 8 Tax Cas. 265.
(3) (1933) L. R. 60 I. A. 133, 137, 138, 139.

(1) [1904] 6 F. 894; 5 Tax Cas. 159.
(2) (1928) 44 Times L. R. 630; 14 Tax Cas. 22.
(3) [1933] A. C. 139.

Now it is to be observed that this case is a much stronger case than that of the post-dated cheque or that of the notes of hand dealt with in the earlier case. The essential fact was that the new mortgage was given to secure the existing debt and could not be regarded as payment of that debt as would have been the case if something "realizable" or "the "equivalent of cash" had been given to the creditor.

I have quoted the language of this latter case because much of the reasoning which it contains is applicable to the present case. Neither decision is, of course, an authority binding on this Court, and I wish respectfully to reserve for consideration whether, if a case similar to the second of the two cases were to arise under the English Income Tax Acts, the circumstance that the mortgagors under the substituted mortgage were not the same as those under the original mortgage might not be of importance. But subject to this reservation I respectfully agree with the reasoning upon which these two decisions are based. A security produces the income appropriate to it. The income appropriate to a money bond is money. The parties may agree to substitute something different as income of the security, and the thing so substituted, namely goods, thereupon becomes the appropriate income of the security. But where the debtor defaults and the appropriate income being money is not changed into something else but remains money which the debtor promises to pay at a later date, it does not appear to me to be possible to say that the security has produced any income, since the income which the security was intended to provide has not been provided. This circumstance is not affected by the facts that (as in the present case) a new undertaking to pay is given, that such new undertaking is in a form which can be conveniently dealt with on the market or that such new undertaking may contain provisions intended to give better security for the money due. The inescapable fact remains that the interest due on the original bonds held by the respondents has not been paid.

All the arguments put forward on behalf of the Crown really come down to the same thing—namely, that because the funding bond was of money's worth, it therefore follows that the respondents in receiving it received an income profit. But this proposition will not bear examination. It involves the assumption that whenever the holder of a security receives from that security money's worth he receives income, and this is not the case. It is one thing to say that income is none the less income because it is received in the shape of money's worth instead of money—this proposition is true; it is a totally different thing to say that the receipt of money's worth is necessarily a receipt of income—this proposition is not true. When a bond is issued with coupons attached the coupons are money's worth—they can be sold before maturity under discount, yet it could not be suggested that in receiving the coupons the holder of the bonds had received income. Again when the coupons originally attached to the bond have all been paid and the holder of the bond sends in the talon and receives a new set of coupons he receives money's worth, because the coupons are of value; but he does not for that reason receive income. Again in the case which I have given of the post-dated cheque, the cheque is money's worth but it is most certainly not income. In all these cases the appropriate income of the security is money and remains money—there is no substitution of some other form of income for money, and unless and until the security has produced money or something substituted for money it has not produced income.

In the present case the form of the funding bond and the fact that it is a marketable security tend to conceal the fundamental petitio principii which underlies the Crown's argument. There were no doubt sound commercial reasons for issuing a document of this kind. But when its true nature is considered, it is nothing but a promise to pay at a future date the interest in respect of which default has been made. The fact that the promise to pay this interest takes the form of a marketable instrument appears to me to be irrelevant. The coupon itself presumably had some value before the default. If the funding bond has more value than the coupon had, that merely means that the debtor's promise to pay embodied in it is of more value than his original promise to pay; it does not mean that he has paid, for he has not. The tree has produced no fruit, to use a well-worn simile; the owner of the tree has refused to allow it to be picked and has merely given a voucher entitling the holder to pick it at a future date.

Of the authorities referred to in the course of the argument there is only one to which I think it necessary to refer—namely, the case of *Commissioners of Inland Revenue* v. *Lawrence, Graham & Co.* (1) In that case, under the provisions of a mortgage deed, on default of payment of any half-year's interest "the sum due in respect of the half-year's interest "so unpaid" (which in point of construction was held to mean the net sum after deduction of tax) was to be converted into principal money and added to the amount of the loan. Default took place, the provisions of the mortgage deed took effect, and upon a subsequent sale by the mortgagees, their solicitors, who received the purchase-money, paid over to the mortgagees—together with other moneys—a sum of 2378*l.* 19*s.*, representing the net interest capitalized, and paid the balance to second mortgagees. The Crown claimed that on paying this sum of 2378*l.* 19*s.* to the first mortgagees the solicitors were paying interest within the meaning of Rule 21 not payable out of profits or gains brought into charge, that upon such payment they were bound under that rule to deduct tax, and that they were assessable in a sum equal to the gross amount of the interest. The real question which arose was whether, having regard to the terms of the mortgage deed when properly construed, the mortgagor had deducted tax on each occasion when the interest was capitalized, and it was held that he had done so. By the terms of the contract itself, providing as it did for capitalization of the net amount, the capitalization was treated by the parties as a payment on account as between mortgagor and mortgagee—the fact that the sum to be capitalized was a net sum inevitably produced this result. This case, which turned upon the effect as between the parties of a particular provision in the original

(1) [1937] 2 K. B. 179.

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contract, is not in my opinion of any assistance in the decision of the present question. In the present case a defaulting debtor instead of paying the interest due has repudiated its obligations. This appears from the opening words of the circular referred to at the beginning of this judgment. It offered to its creditors a promise of deferred payment, the acceptance of which (and there was no alternative) cannot in my opinion upon the facts be treated as though it were payment.

In the result I am in agreement with the decision of the learned judge, and this appeal must be dismissed with costs.

I am authorized by Lord Romer to say that he has read the judgment which I have just delivered and agrees with it, and has nothing to add to it.

MacKinnon L.J. The respondents were the holders of certain gold bonds issued by the United States of Brazil. The bonds had interest coupons attached, which were payable either in dollars in New York, or in sterling in London. So long as the bonds were honoured and the coupons were paid, the respondents were of course liable for income tax under Schedule C. In March, 1932, the Brazilian Government announced that it could not pay the interest on the bonds. In lieu of doing so it offered in exchange for each coupon to issue twenty-year funding bonds, bearing interest at five per cent. In other words, instead of paying the interest due on the original bonds, it offered to pay in October, 1951, and to add interest on the amount at five per cent. per annum, payable by coupons on the funding bonds.

The respondents, having received funding bonds in exchange for their gold bond coupons, sold the funding bonds from time to time. In respect of the moneys received from such sales they have been assessed to income tax under Case IV. of Schedule D, it being alleged that the moneys received were "income arising from securities out of the United "Kingdom." The "securities," of course, are the original gold bonds, not the funding bonds; the whole funding bond together with its interest coupons was in each case sold.

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There was therefore a foreign security, on which interest was payable, which interest if paid would constitute income from a foreign security. The debtor having refused to pay the interest, issued a document promising to pay it in twenty years' time. The promise in this document being assignable, it was saleable and was sold. The question is whether the money realized from the sale of this promise to pay in futuro the interest on the security can properly be said to be "income "from the security."

I agree with Finlay J. in thinking that the answer to this question must be in the negative. It is important to realize clearly the essential nature of this transaction; and that is apt to be obscured by the fact that what the debtor handed over in lieu of payment was a document possessing the character of a marketable security. The essential nature of the transaction was that the debtor, avowing his inability to pay what had fallen due, gave instead his written promise to pay at a future date. He might just as well have given his own post-dated cheque. Or, still more simply, he might have written on each of the gold bond coupons a promise to pay it in twenty years, with interest annually until payment.

It is quite true that income may arise by the receipt of money's worth as well as by the receipt of money. And it is equally true that a debtor may pay his debt by giving the promise of a third party to pay; indeed the best form of payment in the world, Bank of England notes, if subjected to the unusual treatment of being read, will be found to be promises by a third party to pay. But I am satisfied that there can never be payment of his debt by a debtor by giving his own promise to pay at a future date. And I am equally satisfied that, though income arises to a creditor from a debtor's paying his debt, income does not arise by the debtor's promising that he will pay his debt later on. This appears to be precisely the reasoning of the Privy Council in the case of *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Darbhanga* (1), the Indian Appeal cited to us from the Law Reports. Lord Macmillan there said: "But

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(1) (1933) L. R. 60 I. A. 146, 161.

"the seventh item . . . . consisting of the debtor's own "promissory notes, was clearly not the equivalent of cash. A "debtor who gives his creditor a promissory note for the sum "he owes can in no sense be said to pay his creditor ; he merely "gives him a document . . . . possessing certain legal attributes. "So far then as this item . . . . is concerned the assessee did "not receive payment of any taxable income from his debtor "or indeed any payment at all." To which I would add, so as to include the further incident that occurs in this case, that if the debtor cannot be said to have paid his creditor by giving him his promissory note, equally he cannot be said to have paid his debt when the creditor realizes some money by assigning the promissory note to a third party. And as the creditor does not receive payment from his debtor when he receives his promissory note, nor does " income arise " from that receipt, so equally he does not receive payment or acquire income when he sells the promissory note for what it will fetch. I agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

Solicitors : *Solicitor of Inland Revenue ; Linklaters & Paines.*

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KAWASAKI KISEN KABUSHIKI KAISHA *v.* BANTHAM STEAMSHIP COMPANY, LIMITED.

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Feb. 2, 3.

Shipping—Charterparty—Construction—Hire—Payment to be made monthly in advance—"Punctual and regular payment"—Deadweight—Hire to be calculated on tonnage—First monthly instalment of hire not paid on delivery of ship—Withdrawal of ship by shipowners—Shipowners' implied obligation to supply statement of ship's deadweight to charterers—Withdrawal not justified.

A charterparty provided that the charterers should pay for the use and hire of the chartered ship 3*s.* 9*d.* per ton on deadweight as ascertained on delivery from builders' yard, that the payments for hire should be made in London in cash monthly in advance, and that, failing the punctual and regular payment of hire, the owners should be at liberty to withdraw the ship from the service of the charterers.

The chartered ship arrived at her loading port on April 13, 1937. The charterers' agent accepted the ship and requested the captain to begin loading at once, which he did. No statement of the ship's deadweight had been delivered by the shipowners to the charterers, and the latter did not pay the first month's hire until 7 P.M. on the evening of April 15, when they sent a cheque to the shipowners in payment of the first month's hire and other matters. But the shipowners returned the cheque on the ground that it was out of time, and they gave notice withdrawing the ship from hire :—

Held, that there must be implied into the charterparty an obligation on the shipowners to inform the charterers of that which was within their knowledge and not within the knowledge of the charterers—namely, the correct amount of the deadweight capacity of the ship—to enable the charterers to put themselves in a position to discharge their obligation to pay the hire due under the charterparty, and that, as no such information was given by the shipowners to the charterers until after the date relied on by the shipowners as the date on which they claimed to be entitled to withdraw the ship from hire, they were not justified in withdrawing the ship from the service of the charterers.

Makin v. *Watkinson* (1870) L. R. 6 Ex. 25, applied.

SPECIAL CASE.

By a charterparty dated June 2, 1936, the shipowners let their ship, the *Nailsea Meadow*, on hire to the charterers, who were a Japanese shipping company carrying on business at Kobe, with agents in London. The ship was not then completed by the builders. The charterparty provided that the ship "estimated about 8950 tons deadweight capacity

". . . . actual deadweight and cubic to be ascertained on "delivery from builders' yard," was to proceed "across the "Atlantic in ballast to port of delivery," which, by a subsequent arrangement, became the port of Houston, in Texas. The charterparty further provided that "the said owners agree "to let and the said charterers agree to hire the said vessel from "the time of delivery for 12 calendar months."

By clause 4 of the charterparty it was provided that "the "charterers shall pay for the use and hire of the said vessel "3*s*. 9*d*. per ton on deadweight, as ascertained on delivery from "builder's yard, British sterling per calendar month commencing on and from the day of her delivery . . . . and "at and after the same rate for any part of a month, hire to "continue until the hour of the day of her redelivery. . . . ."

By clause 5: "Payment of said hire to be made in London "in cash monthly, in advance, and for the last half month, "or part of same, the approximate amount of hire, and "should same not cover the actual time, hire is to be paid for "the balance day by day as it becomes due, if so required by "the owners, unless bank guarantee or deposit is made by "the charterers, otherwise, failing the punctual and regular "payment of hire or bank guarantee . . . . the owners shall "be at liberty to withdraw the vessel from the service of the "charterers. . . . . Delivery to count from 7 A.M. on the "working day following that on which written notice has "been given before 4 P.M., but if required by charterers, "loading to commence at once, such time to count as hire."

The ship arrived at Houston, Texas, on the morning of April 13, 1937. Certificates were issued by the charterers' agents that the ship was fit to load and certifying the amount of fuel oil and water on board. The charterers' agents accepted her and requested the captain to begin loading at once, and they agreed with the captain that she should be considered as having been delivered at 3 P.M. on April 13, 1937. The agents agreed to record this in a written certificate of delivery. That certificate was drawn up and was dated April 13, 1937, but was not in fact signed by either party until April 15. Further, on April 13 the captain made out a written notice dated 1.30 P.M. on April 13 that the ship was ready to load, but he did not present it to the agents until 3.55 P.M. on April 15 (when he presented it at their request) because he considered that in the circumstances a notice of readiness to load was not required.

On April 14, 1937, the shipowners applied to the charterers' agents in London for payment of the first month's hire, but those agents had not then received funds from the charterers. On the following day the shipowners again applied for payment, but the charterers' agents were still unable to pay, but said that they had been advised by cable that funds were being remitted. Thereupon the shipowners gave notice withdrawing the ship from hire on the ground of non-payment. At 7 P.M. on the evening of April 15, 1937, the shipowners received a cheque for 1289*l.* 13*s.* in payment of the first month's hire and other matters, but the cheque was immediately returned. On April 15, 1937, the master, acting on cabled instructions, stopped loading at Houston at 5 P.M. On April 16 the charterers' London agents said that as the captain had only handed in notice of readiness to load at 3.55 P.M. on April 15, although loading had actually begun earlier, the hire only began to run after that time, and they therefore enclosed a bankers' draft, with a submission that hire would only begin to run at 7 A.M. April 16, which was equivalent to 2 P.M. London time.

The shipowners returned that draft, and the dispute was submitted to arbitration.

The charterers, claimants in the arbitration, contended: (1.) That, on a true construction of clause 5 of the charterparty the respondents had no right to withdraw the ship from the claimants' service on non-payment of the first month's hire. (2.) That no hire became due until the respondents claimed it and notified the claimants of the actual deadweight as ascertained from the builders of the vessel. (3.) That in fact payment of the first month's hire was made in strict accordance with the terms of the charterparty. (4.) That payment was made promptly within a reasonable interpretation of the obligations of the parties.

The shipowners contended: (1.) That on the facts and on a true construction of the charterparty they were entitled to withdraw the ship from the service of the claimants. (2.) That the charterparty called for the punctual and regular payment of the hire and that such punctual and regular payment was not made or tendered.

Subject to the opinion of the Court on a special case the arbitrators awarded that the shipowners were not entitled to withdraw the ship from the service of the charterers. The question for the opinion of the Court was whether on the facts found and on a true construction of the charterparty the shipowners were entitled to withdraw the ship from the service of the charterers.

A. T. Miller K.C. and *Cyril Miller* for the shipowners. Delivery was taken by the charterers' agents at 3 P.M. on April 13, 1937, and the first month's hire was then due. That was not paid. The charterers failed to make punctual payment of hire within clause 5 of the charterparty, and the shipowners were entitled to withdraw the ship from the service of the charterers. See Scrutton on Charterparties, 13th ed., p. 418. The phrase "failing the punctual and "regular payment of hire" in clause 5 applies to the first instalment as well as to the subsequent ones. In *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1), Bigham J. held that payment was not too late if made within a reasonable time, but that case was distinguished by the House of Lords in *Maclaine* v. *Gatty*. (2) In *Tyrer & Co.* v. *Hessler & Co.* (3) it was held that the shipowners could exercise their right of withdrawal even though they had not made a demand for payment. "Punctual" payment means payment on the day fixed for payment: *Leeds and Hanley Theatre of Varieties* v. *Broadbent* (4), approved in *Maclaine* v. *Gatty*. (2)

Sir Robert Aske K.C. and *W. L. McNair* for the charterers. Clause 5 of the charterparty is a penal clause and should not be harshly construed as against the charterers. It cannot mean that the charterers should pay for one month's hire before beginning to load. The obligation to pay only arose from the date of delivery as defined in clause 5—namely, on the day following that on which notice of readiness has been given by the shipowners to the charterers. The charterers' agents at Houston had no power to vary the terms of the charterparty by arrangement with the captain, so as to render payment due before notice of readiness was received. The words "punctual and regular payment" are inappropriate to the payment of a first instalment, and cannot apply, because the point of time was itself uncertain. "Punctual" means reasonably near the time indicated: *Nova Scotia Steel Co., Ld.* v. *Sutherland Steam Shipping Co., Ld.* (1)

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(1) (1899) 5 Com. Cas. 106.
(2) [1921] 1 A. C. 376.
(3) (1902) 7 Com. Cas. 166.
(4) [1898] 1 Ch. 343.

Finally, the amount of the instalment was not specified. It was not to be fixed until the deadweight was ascertained. The amount of the instalment, when due, was within the knowledge of the shipowners, and it was necessary for the shipowners to serve a demand on the charterers before it could become due, the actual amount being uncertain. Until the deadweight was ascertained and the amount communicated to the charterers they were under no liability: *Makin* v. *Watkinson* (2); *Brown* v. *Great Eastern Ry. Co.* (3); and *Stanton* v. *Austin.* (4) The rule is discussed in Leake on Contracts, 8th ed., at p. 483.

Miller K.C. in reply. If the charterers did not know what the deadweight of the ship was, they ought to have asked the shipowners. Moreover, it was open to them to ascertain the amount of the first instalment from the deadweight scale in the captain's cabin. No term should be implied that the shipowners should inform the charterers of the amount of the deadweight. There was no business necessity to imply such a term. Nor was it a condition precedent to the liability of the charterers that they should be informed of the deadweight.

(1) 5 Com. Cas. 106.

(2) L. R. 6 Ex. 25.

(3) (1877) 2 Q. B. D. 406.

(4) (1872) L. R. 7 C. P. 651.

BRANSON J. [referred to the facts and said]: The contention of the owners is that at the moment that the loading began the ship had been delivered and hire had begun to run. No payment was made in respect of the chartered hire of the ship until the afternoon of April 15, and at that time the London agents of the charterers tendered a cheque for the first month's chartered hire less a sum which had to be deducted by reason of the fact that the ship went to Houston instead of to the original port which was specified in the charterparty, and as to which no question arises. That was refused on the ground that it was out of time and the owners intended to, and in fact then and there did, withdraw the vessel from the service of the charterers. The question is whether, in those circumstances, they were entitled so to withdraw her. The arbitrators have found that they were not, and, though they have stated the facts very completely, they have not, as indeed there was no need that they should, stated the grounds on which they have come to the conclusion that the owners were not entitled to withdraw the ship.

The way the case is put on behalf of the owners is this. It is said that delivery of the ship was taken at 3 P.M. on April 13, that under the charterparty the first month's hire became due in advance, that it should, therefore, have been paid before delivery was taken, that, not having been paid before delivery was taken, the charterers had failed in the punctual and regular payment of hire within the meaning of clause 5, and that consequently the owners were at liberty to withdraw the vessel from the service of the charterers.

The objections taken by the charterers to the case so put forward are, first, that on the true construction of clause 5 "delivery" within the meaning of the charterparty does not take place until 7 A.M. on the working day following that on which a notice of readiness is given, and that as in this case no notice of readiness was given until April 15, payment of the chartered hire did not become due until 2 P.M. in London on April 16, and by that time a tender had been made. It is also said that the clause in the charterparty relating to punctual and regular payment has no application to the first month's payment of hire. It is also said that when one finds a word like "punctual" in a commercial document it does not mean "punctual" but something more elastic—something giving an option to pay within two or three days of the named date. Finally, it is said, on behalf of the charterers, that on the true construction of this charterparty the obligation to pay hire could not arise, and did not arise, until the owners had informed the charterers of the amount of the actual deadweight which was to be ascertained on delivery from the builders' yard. That is put on the ground that, although there is no such provision in the charterparty, it follows by necessary implication, because, until the owners have informed the charterers of the deadweight capacity, it is impossible for the charterers to know how much they have to pay, the amount which they have to pay being 3*s*. 9*d*. per ton on the deadweight as ascertained on delivery from the builders' yard.

As, in my view, the last point is really the point which is decisive of this case, I propose to deal with it first. The authority on which I am asked to imply into this charterparty a term that payment is not to become due until that information has been given to the charterers is *Makin* v. *Watkinson*. (1) That case arose on a question between a lessor and a lessee. There was a covenant in the lease by the lessor to keep in repair the main walls, main timbers, and roofs of the demised premises. The Court held in that case that there must be implied into the contract a term that the obligation to repair could only arise after notice had been given that repair was needed. The grounds on which the Court made that implication have an application which is perfectly general to all contracts, as it seems to me, and which is in no way confined to contracts as between landlord and tenant. It is expressed by Channell B. in the following language. Referring to the case of *Vyse* v. *Wakefield* (2) he said (3): It "is, to some extent, an authority, for it "warrants the proposition that, when a covenant would,

(1) L. R. 6 Ex. 25.
(2) (1840) 6 M. & W. 442.
(3) L. R. 6 Ex. 27.

"according to the letter, be an unreasonable one, words "not inconsistent with the words used may be interpolated "to give it a reasonable construction. This proceeds on the "assumption that the contracting parties were reasonable "men, and intended what was reasonable"; and Bramwell B., in the same case, said (1): "If we look to the reason of the "rule, it is, that when a thing is in the knowledge of the "plaintiff, but cannot be in the knowledge of the defendant, "but the defendant can only guess or speculate about the "matter, then notice is necessary."

It is said that this is not a case in which any implication of an obligation to give notice is necessary to the proper fulfilment of the contract. It appears to me that, if the parties are standing on their strict rights, there must be an obligation on the owners to give to the charterers the actual deadweight which was ascertained on delivery from the builders' yard before the charterers can be asked to make out a cheque, because the amount for which they have to make out their cheque is, and can only be, ascertained on the basis of the knowledge of the actual deadweight. It is said that there is no need to imply a term that the owners should give that information before their right arises to receive the money, because there are other ways in which the charterers might have found out what the deadweight capacity was. I do not think that in looking at a contract of this kind in order to see what is the fair implication to be made one can have regard to such possibilities as that an application to the builders by the charterers might have led to the discovery of this figure, or that when Captain Wynne went on board he might have asked to see the deadweight scale and ascertained it for himself. I think that there must be implied into the contract an obligation on the owners to inform the charterers of that which was within their knowledge and not within the knowledge of the charterers—namely, the correct amount of the deadweight capacity—in order to enable the charterers to put themselves into a position to discharge their obligation to pay the chartered hire. No such communication was made until after the date on which the owners rely as the date when they were entitled to withdraw the ship from the service of the charterers, and on that ground I think that this award must be supported.

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(1) L. R. 6 Ex. 30.

A good deal of argument has been directed to the other points in the case, and I think that it is only right, therefore, although I think that the point with which I have already dealt is sufficient to decide the case, that I should express my views on the other matters which have been argued before me.

With regard to the first of these points, in my view, the period of twelve months provided by the charter began at 3 P.M. on April 13, and I fail to follow the force of the argument which suggests that, on the true construction of the last paragraph of clause 5 of the charterparty, the period did not begin until 7 o'clock in the morning after the notice of readiness had been given. It seems to me that the words "but if required by the charterers loading to commence at "once, such time to count as hire," is an alternative provided by the charter to the giving of notice. The business of it is this, that when the ship arrives she can put on the charterers the obligation to take delivery by giving this notice. They give the notice at 4 P.M., and then, whether the charterers take delivery or not, at 7 A.M. on the next working day the period begins to run. On the other hand, the charterers may be very anxious to get possession of the ship, and then there is the alternative that they can come and ask for it, and, if they do, it is to be handed over at once and loading is to begin at once. But with the beginning of the loading begins the period of the charter and the obligation to pay chartered hire.

The view which has been taken of this case, as it seems to me, leads to a somewhat ridiculous position. The charterers say : " The period only begins at 7 A.M. on April 16 "because the captain only gave us notice at 3.55 P.M. on the "15th." The case finds that the captain only gave the notice because the charterers' agents asked for it and not because he wanted it. I cannot see that any business man can have any notion that there is any need to give a notice of readiness when his ship is already being loaded as hard as it can be by the charterers. That seems to me to be unpractical and absurd. I think, therefore, that the charterparty on its true construction provided for the delivery of the ship to begin, if the charterers so wished, before the expiration of a notice of readiness. In this case they took that alternative, and the period of the twelve months began at 3 o'clock on April 13.

That being so, the next question is whether there is anything, apart from the questions which I have already dealt with, to prevent the obligation to pay hire from arising also on that day. It is said that the provision as to payment of hire in advance does not apply to the first instalment. I must construe the charterparty before me, looking at the language which is used in it. I think that it would be very unwise, and very improper, to try to construe this contract as though any particular words which are used in it must necessarily have the same meaning as those words used in different settings in different contracts. I prefer to construe this contract treating it as a document written in English to which the ordinary meanings of ordinary words must be given.

Looked at in that way the first question one asks is, What right is there to say that the provisions relating to the payment of the hire are not to apply to the first instalment? Plainly, "payment of the hire to be made in London in cash monthly" must apply all through. On what criterion of construction can I rely to say that the words "in advance" shall not be equally applicable? It is said that there is some difficulty in paying in advance and that there might be a difficulty in having the money ready because it is not clear when the ship will arrive. The answer to that, again, is in the last paragraph of clause 5 of the charterparty, which says that, if the ship is insisting on delivery beginning, it has to give notice, and then there is from 4 P.M. on the one day until 7 A.M. on the next working day in which payment in advance can be made. If the other limb of that sentence is to be operated, then the charterers who are going to ask for delivery of the ship can go with their money in their hands and pay it before they take delivery. I see no reason, therefore, for deciding that, whereas the provision that payment is to be made in London in cash should apply, the very next words in the same sentence should not apply. I think, therefore, that the contract provides for payment in advance, even of the first instalment.

It is then said that, even though that may be the case, the provisions about liberty to withdraw on failure to pay punctually and regularly cannot apply to the first instalment. Again, I fail to see the difficulty. It is argued, I suppose, that a payment may be made in advance if it is a payment for the first month's hire even though it is not made before the actual moment that the first month begins. It may be, in a sense, in advance if it is paid at the end of the first week or the second week, because qua some part of the payment it is still being paid in advance. But one has to look at the particular provisions of the clause which is being construed, and one finds in this clause provisions which seem to me to emphasize the rigidity of the word " punctual " in a manner which makes it impossible to construe it as loosely as I am urged by the charterers to construe it. I see no reason for supposing that there was to be more laxity in the first month than there was to be in the last month, particularly having regard to the fact that clause 5 of the charterparty states: " Payment of said hire to be made in London in "cash monthly, in advance, and for the last half month or "part of same the approximate amount of hire, and should "same not cover the actual time hire is to be paid for the "balance day by day as it becomes due." The parties are there providing that, when the charter is coming to an end and there is an odd bit of time still to run, perhaps because the ship is late or because she has not finished loading, or something of that kind, day by day this hire has to be paid in advance. I find it impossible, in a clause which contains that provision, to say that at the beginning the parties were so careless as to when the money was to be paid in advance that they never intended that any payment in advance should be necessary

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Branson J.

at all with regard to the first instalment, or, if it was, that they did not mind whether it was paid at the end of the first week or the second week or the third week. Whatever may be the view on other contracts with different language, I cannot see on this contract any means of extending the meaning of the word "punctual" in the way I am asked to extend it. I suffer under the same disability in that respect as Lord Shaw of Dunfermline did in *Maclaine* v. *Gatty*, in which he said (1): "My Lords, my mind cannot comprehend "the elasticity of punctuality. I know of no method of "construction of a contract by way of contradiction of it."

On those grounds, therefore, it appears to me that if the owners had given to the charterers the information with regard to the deadweight capacity, which they should have done under the charterparty, and done that on delivery from the builders' yard as the charter provides that they should do, they would have been entitled to withdraw the ship on the ground that the charterers had failed in their obligations under clause 5 of the charter and had given rise to the owners' liberty to withdraw the vessel which that clause confers on them in the circumstances therein mentioned. But, as I have already said, it appears to me that the failure to let the charterers know what was the deadweight capacity, and therefore failure to put them in a position to fulfil their obligation to pay in advance, has rendered it impossible for the owners to withdraw the vessel. The award must be upheld.

Appeal dismissed.

Solicitors for the appellants: *Ince, Roscoe, Wilson & Glover, for Allen Pratt & Geldard, Cardiff.*

Solicitors for the respondents: *Thomas Cooper & Co.*

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(1) [1921] 1 A. C. 376, 393.

T. W. M.

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